

San Francisco Law Library

No.

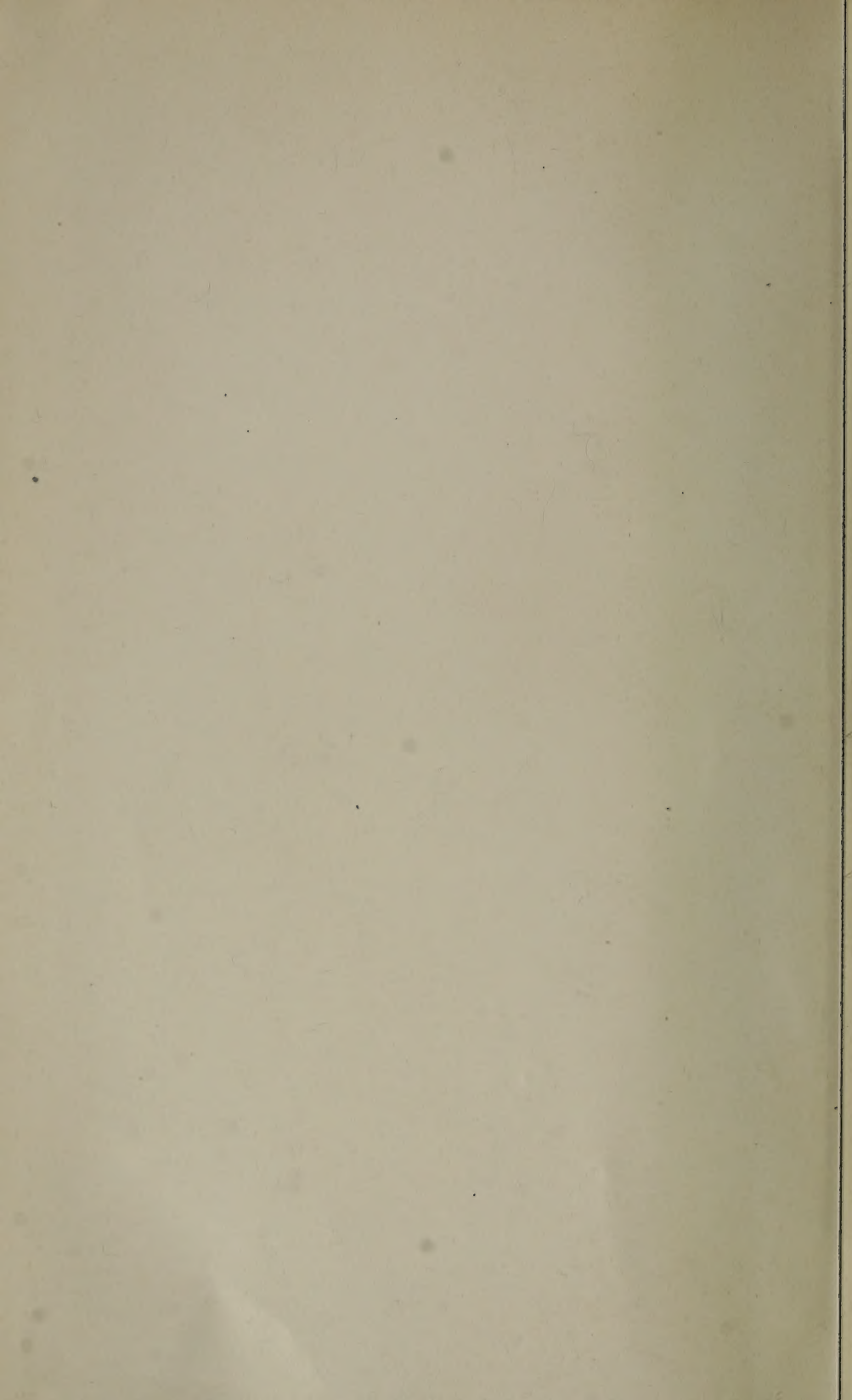
Presented by

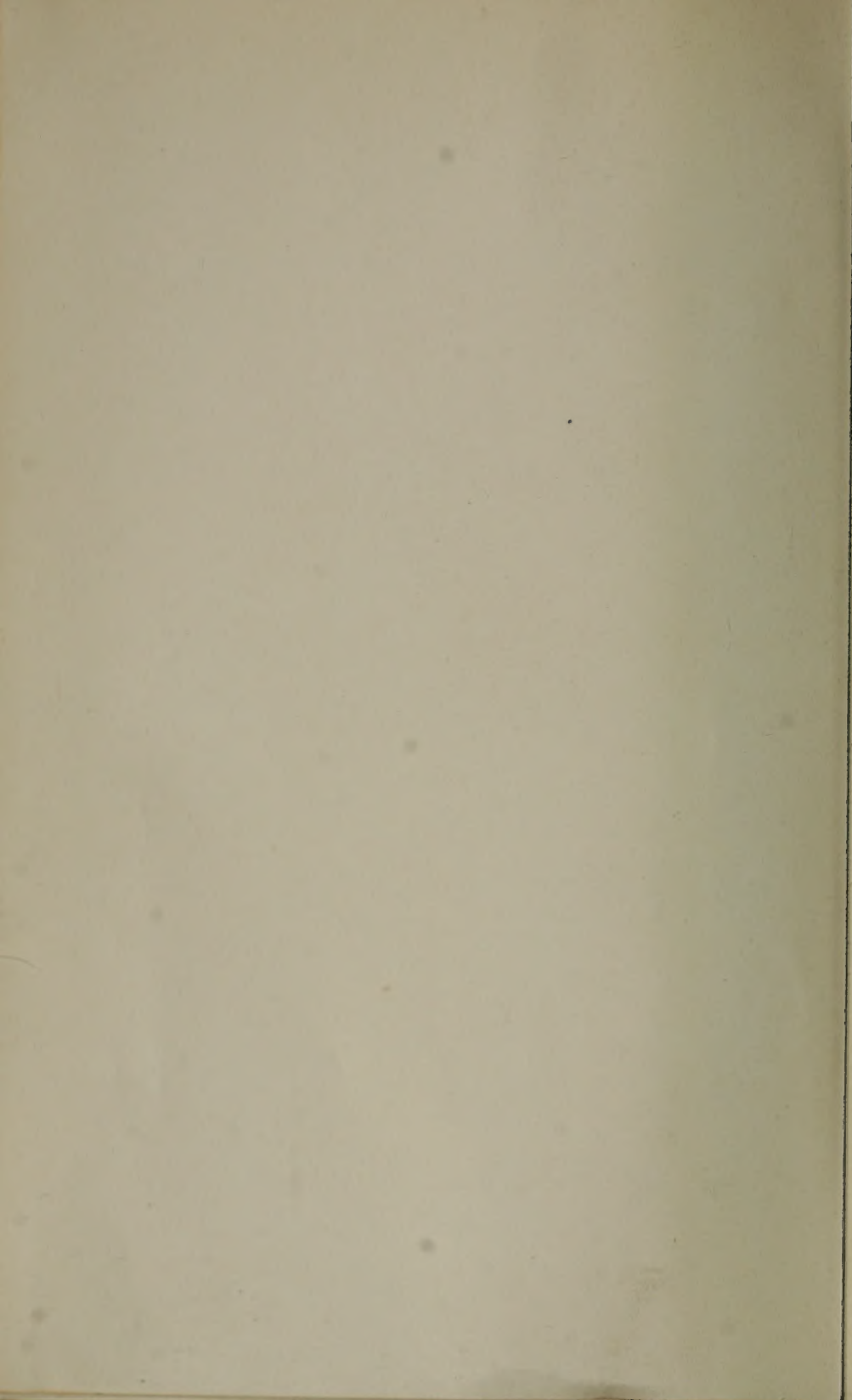
.....

EXTRACT FROM BY-LAWS.

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured. A party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.





576 a
776
No. 2194

IN THE
United States Circuit Court of Appeals
NINTH CIRCUIT

J. A. CRESSEY,

Plaintiff in Error,

VS.

INTERNATIONAL HARVESTER COMPANY OF
AMERICA, a Corporation,

Defendant in Error.

On Writ of Error to the United States
District Court, District of Oregon

TRANSCRIPT OF RECORD.

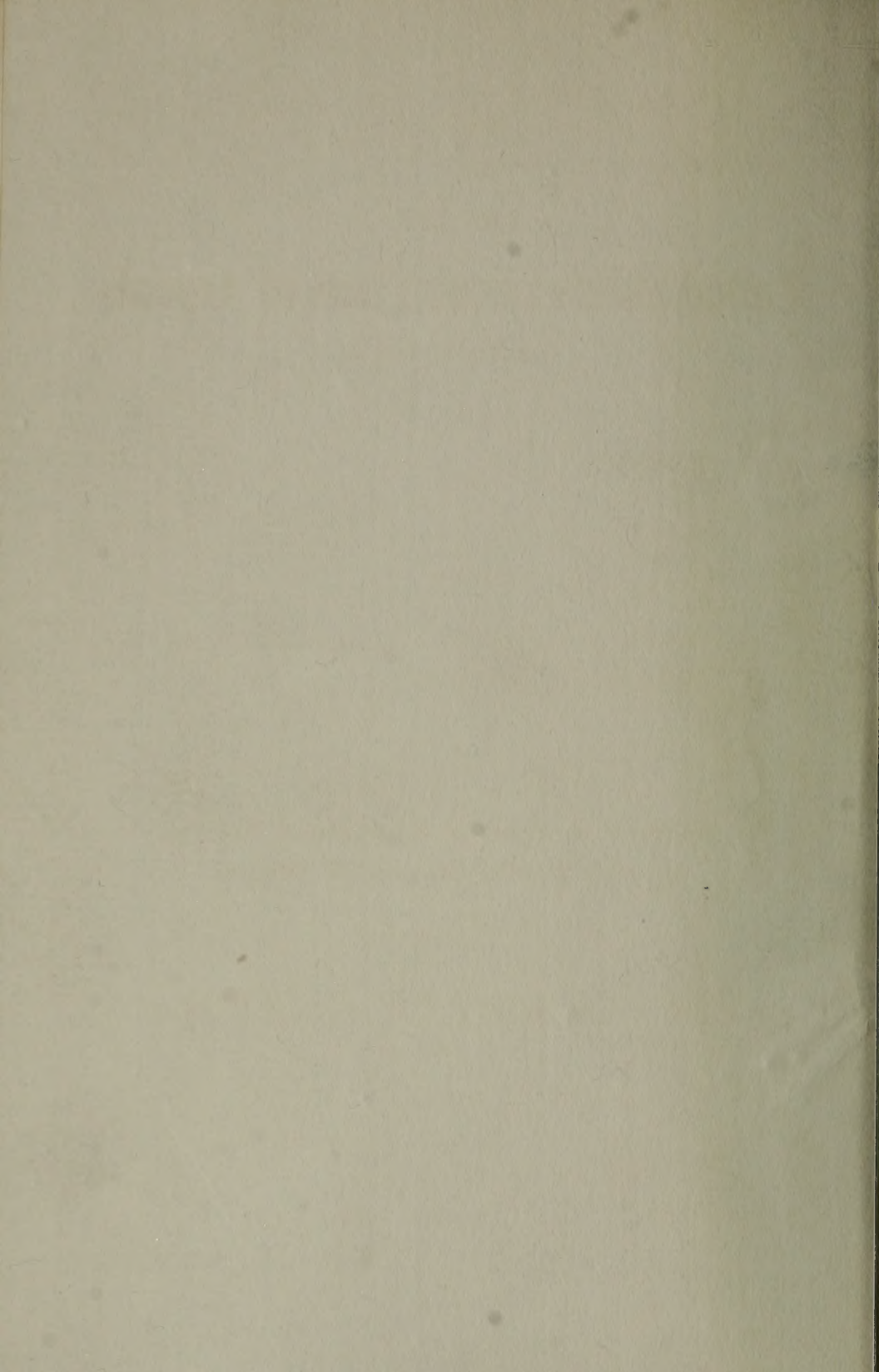
RECEIVED

OCT 21 1912

F. D. MONCKTON,

FILED

OCT 28 1912



Records of U. S. Circuit
Court of Appeals
1776

No.

IN THE
United States Circuit Court of Appeals
NINTH CIRCUIT

J. A. CRESSEY,

Plaintiff in Error,

VS.

INTERNATIONAL HARVESTER COMPANY OF
AMERICA, a Corporation,
Defendant in Error.

On Writ of Error to the United States
District Court, District of Oregon

TRANSCRIPT OF RECORD.

IN THE
United States Circuit Court of Appeals
NINTH CIRCUIT

J. A. CRESSEY,

Plaintiff in Error,

VS.

INTERNATIONAL HARVESTER COMPANY OF
AMERICA, a Corporation,

Defendant in Error.

**Names and Addresses of Attorneys
Upon This Writ:**

For the Plaintiff in Error:

S. A. KEENAN,

Empire Bldg., Seattle, Wash.

For the Defendant in Error:

COLE & COLE,

Chamber of Commerce Bldg., Portland, Oregon

INDEX

	Page.
Amended Complaint	1
Answer to, Amended Complaint	7
Amended Complaint, Second, Motion to Strike.....	37
Application for Entry of Judgment, Notice of.....	46
Assignments of Error	49
Bond on Writ of Error	52
Complaint, Amended	1
Complaint, Answer to Amended	7
Complaint, Second Amended, order granting time to file	19
Complaint, Second Amended	19
Complaint, Second Amended, Motion to Strike.....	37
Complaint, Second Amended, Order Sustaining Motion to Strike.....	43
Citation on Writ of Error	56
Clerk's Certificate to Transcript	58
Demurrer to Second Amended Complaint, Order Sustaining	45
Demurrer, to Amended Complaint	44
Exhibit A	32
Exhibit B	33
Exhibit C	35
Exhibit D	36
Final Judgment	47
Judgment, Motion for on the Pleadings	16
Judgment, Order Sustaining Motion for on Plead- ings	17
Judgment, Entered February 29-1912	18

Index.	Page.
Motion for Judgment on Pleadings	16
Motion, for Judgment on Pleadings, Order Sustaining	17
Motion to Strike Second Amended Complaint.....	37
Motion to Strike Second Amended Complaint, Order Sustaining	43
Notice of Application for Entry of Judgment.....	46
Order Sustaining Motion for Judgment on the Pleadings	17
Order Granting Leave to File Second Amended Complaint	19
Order Sustaining Motion to Strike Second Amended Complaint	43
Order Sustaining Demurrer to Second Amended Complaint	45
Order Allowing Writ of Error	51
Order Enlarging Time to File Transcript	57
Petition for Writ of Error	48
Second Amended Complaint, Order Granting Leave to File	19
Second Amended Complaint	19
Second Amended Complaint, Demurrer to	44
Transcript, Order Enlarging Time to File	57
Transcript, Clerk's Certificate to	58
Writ of Error, Petition for	48
Writ of Error, Order Allowing	51
Writ of Error, Bond on	52
Writ of Error	54
Writ of Error, Citation on	56

*In the District Court of the United States, for the
District of Oregon.*

BE IT REMEMBERED, That on the 15 day of December, 1911, there was duly filed in the Circuit Court of the United States for the District of Oregon, an Amended Complaint, in words and figures as follows, to wit:

[Amended Complaint.]

*In the Circuit Court of the United States, for the
District of Oregon.*

J. A. CRESSEY,

Plaintiff,

vs.

THE INTERNATIONAL HARVESTER COMPANY OF AMERICA, a corporation,

Defendant.

Now comes the plaintiff and for causes of action against said defendant, complains and alleges.

I.

For a first cause of action:

1. That said defendant now is and at all the times herein mentioned was a corporation duly organized and existing under and by virtue of the laws of the State of Wisconsin.

2. That on or about August 1st, 1908, plaintiff and defendant through its general agent, J. C. Sheldon, entered into a contract in writing, the original of which is in the possession of said defendant, wherein and whereby plaintiff agreed to devote all his time and services to defendant as a collector of its commer-

cial paper in a certain territory tributary to Aberdeen, South Dakota, for an indefinite period, at a monthly salary of One Hundred Twenty-five Dollars (\$125.) per month besides a commission or bonus as hereinafter set forth.

3. That he immediately entered into the employment of said defendant and so remained until on or about August 1st, 1910.

4. As a further consideration for plaintiff's services under said contract, it was then and there agreed by defendant through its said general agent, J. C. Sheldon, as a part of said contract, that in the event plaintiff collected desperate claims aggregating Twenty-five Hundred Dollars (\$2,500.) between the dates of January 1st, 1909 and January 1st, 1910; and that the total cost and expense to the defendant, for collecting its paper in cash, or securing the same, did not exceed the following schedule, plaintiff was to receive as a commission or bonus, the difference between the amount fixed by said schedule, and the actual amount of the cost and expense to defendant; viz:

For the first 8 months of the year. That is, from January 1st to September 1st, 1909,

Per cent cost on cash collected	7 per cent
Per cent cost on claims secured.....	5 per cent

For the four months of the year from September 1st, 1909, to January 1st, 1910.

Per cent cost on cash collected	2 per cent
Per cent cost on claims secured	2 per cent

5. That in consideration of the said promise and agreement of defendant to pay the said bonus or commission, the plaintiff during the year 1909 devoted his whole time and attention to the business of said defendant, making use of every available means to collect and realize on every claim that said defendant placed in his hands for attention, in doing so it was necessary for plaintiff to work and labor diligently each day and also a large part of many nights; and to attain said results in accordance with the schedule, he economized on expenses in every direction and as a result of said extraordinary labor, efforts, application and economy, he was enabled to attain the following results in collecting and securing the paper of said Company in said territory, viz:

Total amount of cash collected from January 1st, 1909 to September 1st, 1909.... 22,373.53

Total amount of notes and claims of said Company in said territory renewed and secured during said period 12,340.05

Total amount of expense incurred by plaintiff in making said collections and procuring said renewals, including his salary during said period 1,590.41

Total amount of cash collected from September 1st, 1909, to January 1st, 1910.....112,140.29

Total amount of notes and claims of said Company in said territory renewed and secured during said period 11,290.24

Total amount of expense incurred by plaintiff in making the said collections and procuring said renewals, including his salary during said period 884.47

6. That during said year of 1909, plaintiff collected more than \$4000.00 of desperate claims belonging to said defendant Company, and claims that were considered by said Company as practically uncollectable.

7. That by reason of said cash collections and the renewing and securing of defendant's paper as aforesaid, plaintiff earned as said commission and bonus over and above his actual expense and costs to the Company, including his salary, according to said contract and schedule, the sum of Two Thousand One Hundred Seventy-two Dollars (\$2,172.78) and seventy-eight cents, which became due and payable on January 1st, 1910.

8. That no part of said claim has been paid except the sum of Eighty-nine Dollars and eighty-two cents (\$89.82) paid thereon by the Company on or about February 10th, 1910, leaving a balance still due plaintiff from said Company on said claim, in the sum of Two Thousand Eighty-two Dollars and ninety-six cents (\$2,082.96) together with interest thereon at 7 per cent per annum from January 1st, 1910, as provided by the laws and statutes of the State of South Dakota where the said contract was made and delivered.

II.

For a second cause of action:

1. Plaintiff refers to and hereby makes paragraph "1" of his first cause of action a part and parcel of this cause of action.

2. That on November 15th, 1910, plaintiff entered into a contract in writing with said defendant at Portland, Oregon, wherein and whereby he was employed by said defendant in the capacity of a collector of its commercial paper at a salary of One Hundred Twenty-five Dollars (\$125.) per months which employment was for an indefinite period.

3. In said contract it was therein provided: "Either party may terminate this agreement by giving 30 days' notice to the other party. The first party (defendant) may terminate the agreement at any time for neglect of duty, refusal to follow the instructions, or should it consider second party's work unprofitable or undesirable, in which event compensation shall cease the day and date the agreement is terminated."

4. That notwithstanding the terms and conditions of said contract, said defendant on or about July 24th, 1911, notified plaintiff that his employment with said defendant ceased from that date and that prior to said notification, he had received no intimation, knowledge or notice from said defendant that it intended to dispense with his services.

5. That said plaintiff did not neglect his duty to defendant, he did not refuse to follow instructions, that his work and services were profitable and desira-

ble to said defendant and that it had no cause or reason whatever for discharging him without giving the 30 days' notice as provided in said contract.

6. That by reason of said unlawful termination of said contract without giving the said 30 days' notice, said defendant is indebted to plaintiff in the sum of One Hundred Twenty-five Dollars (\$125).

7. That during the month immediately following said discharge, it was impossible for plaintiff to procure other employment and said month was a total loss to him by reason of his not receiving said notice as aforesaid.

WHEREFORE, Plaintiff prays judgment against the said defendant for the sum of Two Thousand Eighty-two Dollars and ninety-six cents (\$2,082.96) and interest thereon at 7 per cent since January 1st, 1910, together with the sum of One Hundred Twenty-five Dollars (\$125.) and interest thereon at 6 per cent since August 1st, 1911 together with costs and disbursements of this action.

S. A. KEENAN,

A. E. WHEELER,

Attys. for Plaintiff.

STATE OF OREGON,

County of Lane,—ss.

J. A. Cressey, Being first duly sworn on his oath says: That he is the plaintiff in the above entitled action, that he has read the foregoing Complaint, knows the contents thereof and believes the same to be true.

J. A. CRESSEY.

Subscribed and sworn to before me this 13 day of December, 1911.

[Notarial Seal.] WALTER B. JONES,

Notary Public in and for the State of Oregon residing at

[Endorsed]: Amended Complaint. Filed Dec. 15, 1911.

G. H. MARSH,
Clerk.

And afterwards, to wit, on the 15 day of December, 1911, there was duly filed in said Court, an Answer to Amended Complaint, in words and figures as follows to wit:

[Answer to Amended Complaint.]

*In the Circuit Court of the United States, for the
District of Oregon.*

J. A. CRESSEY,

Plaintiff,

vs.

INTERNATIONAL HARVESTER COMPANY
OF AMERICA, a corporation,

Defendant.

Comes now the above named defendant and for answer to plaintiff's amended complaint herein filed, admits, denies and alleges as follows:

I.

Defendant admits paragraph one of plaintiff's amended complaint.

II.

Answering paragraph two on page one of plaintiff's amended complaint, being paragraph two of plaintiff's first cause of action, defendant denies each and every allegation thereof, except that defendant admits that on the 18th day of July, 1908, plaintiff and defendant entered into a contract in writing, wherein and whereby plaintiff agreed to devote all his time and services to the defendant as a collector of its commercial paper in certain territory tributary to Aberdeen, South Dakota, for an indefinite period and a monthly salary of \$125.00 per month. Defendant denies that it at any time promised or agreed to pay plaintiff any commission or bonus for any services performed or to be performed for defendant by plaintiff.

III.

Answering paragraph three of plaintiff's first cause of action defendant admits that plaintiff entered into its employ on or about August 18, 1908, and so remained until September 1, 1910.

IV.

Defendant denies each and every allegation contained in paragraph four of plaintiff's first cause of action.

V.

Defendant denies each and every allegation contained in paragraph five of plaintiff's first cause of action.

VI.

Defendant denies each and every allegation con-

tained in paragraph six of plaintiff's first cause of action.

VII.

Defendant denies each and every allegation contained in paragraph seven of plaintiff's first cause of action.

VIII.

Defendant denies each and every allegation contained in paragraph eight of plaintiff's first cause of action.

As a further and separate defense to plaintiff's first cause of action defendant alleges:

I.

That on the 18th day of July, 1908, plaintiff and defendant entered into a certain contract in writing, which said contract is in words and figures as follows, to-wit: PERSONAL SERVICE AGREEMENT.

THIS AGREEMENT, entered into this 13th day of July, 1908, by and between the International Harvester Company of America, (Incorporated) party of the first part, and J. A. Cressey of Watertown, State of S. D., party of the second part.

WITNESSETH, That the first party hereby hires the second party to serve and to perform such duties and at such places as it may from time to time direct; and the second party agrees to faithfully perform to the best of his ability all the duties and responsibilities of such service, and to devote his whole and undivided time to the party of the first party during the continuance of this contract, and not to en-

gage, or to be engaged, nor to be interested in other business during the existence of this contract.

IN CONSIDERATION the first party will pay to the second party at the rate of One hundred twenty five and no|100 Dollars (\$125.00) per month and necessary traveling expenses actually incurred in the business while away from Aberdeen, S. D., his home or usual place of residence.

This contract to be in force from 15th day of August, 1908, until cancelled, which may be done by either party hereto, without liability for damage, by giving written notice.

And it is further agreed that the said second party is to furnish at his own expense to first party a bond for the sum of \$2,000.00 in some surety company, to be designated by the first party.

INTERNATIONAL HARVESTER COMPANY
OF AMERICA,

By J. C. Sheldon.

Approved at Chicago, Ill.,

July 18th, 1908,

International Harvester
Company of America,

J. A. Cressey,

By J. M. Coburn.

That said contract is the contract mentioned and described in paragraph two of plaintiff's amended complaint.

II.

That thereupon plaintiff immediately entered into the employ of defendant and continued to work for

defendant under and pursuant to the terms of said contract until the 13th day of August, 1909, when plaintiff and defendant entered into a certain contract in writing, which said contract is in words and figures as follows:

THIS AGREEMENT, entered into this 10th day of August, 1909, by and between the International Harvester Company of America, (Incorporated), party of the first part, and J. A. Cressey, of Aberdeen, State of S. D., party of the second part.

WITNESSETH: That the first party hires the second party to serve and to perform such duties and at such places as it may from time to time direct; and the second party agrees to faithfully perform to the best of his ability all the duties and responsibilities of such service, and to devote his whole and undivided time to the party of the first part during the continuance of this contract. Second party agrees to remit promptly to first party all money collected for first party.

IN CONSIDERATION the first party will pay to the second party at the rate of One hundred thirty-seven and 50/100 Dollars (\$137.50) per month and necessary traveling expenses actually incurred in the business while away from Aberdeen, S. D., his home or usual place of residence.

This contract to be in force from 1st day of August, 1909 until canceled, which may be done by either party hereto, without liability for damage, by giving written notice.

And it is further agreed that the said second party is to furnish at his own expense to first party a bond for the sum of \$2,000.00 in some surety company, to be designated by the first party.

INTERNATIONAL HARVESTER COMPANY
OF AMERICA,

By J. C. Sheldon.

J. A. Cressey.

Approved at Chicago, Ill., Aug. 13, 1909.

INTERNATIONAL HARVESTER COMPANY
OF AMERICA,

By J. M. Coburn.

III.

That thereupon plaintiff immediately entered into the employ of defendant and continued to perform work, labor and services for defendant under and pursuant to the terms of said contract until September 1, 1910.

IV.

Defendant further alleges that all services performed by plaintiff for defendant between July 18, 1908, and September 1, 1910, were performed pursuant and under the terms of the two contracts in writing hereinbefore set forth.

V.

Defendant further alleges that all of the salary provided for in said contracts to be paid for plaintiff's services has been paid by defendant to plaintiff, and that all services performed by plaintiff for defendant have been fully paid for by defendant.

Answering plaintiff's second cause of action defendant admits, denies and alleges, as follows:

I.

Defendant denies paragraph two thereof except that defendant admits that plaintiff and defendant entered into a certain contract on the 15th day of November, 1910, wherein and whereby plaintiff was employed by defendant in the capacity of a collector for its commercial paper at a salary of \$125.00 per month.

II.

Defendant further alleges that the contract entered into by and between plaintiff and defendant on the 15th day of November, 1910, is substantially in words and figures as follows:

AGREEMENT, entered into this 15th day of November, 1910, between the International Harvester Company of America, (Incorporated) party of the first part, and J. A. Cressey, of Eugene, Oregon, party of the second part.

The party of the first part hereby agrees to employ the party of the second part as long as needed beginning November 15th 1910, at the rate of \$125.00 Dollars per month and his necessary and legitimate traveling expenses when away from Eugene, Oregon.

The party of the second part hereby agrees to devote all of his time and ability to the transaction of first party's business as may be directed, and also agrees to make prompt, complete and accurate reports of his work and expenses to said first party. Second party agrees to remit promptly to first party all money collected for first party.

The agreement is subject to the following conditions: Second party to furnish first party a surety bond at any time if requested, for the sum of \$2,000.00, in the form to be designated by first party, at his own expense. Either party may terminate this agreement by giving thirty days' notice to the other party. The first party may terminate the agreement at any time for neglect of duty, refusal to follow instructions, or should it consider second party's work unprofitable or undesirable, in which event compensation shall cease the day and date the agreement is terminated.

Should the time of service be continued by first party beyond the time specified, it is to be on the same terms and conditions as above.

INTERNATIONAL HARVESTER COMPANY
OF AMERICA,

By L. W. Carnahan.

J. A. Cressey.

III.

Defendant admits paragraph four of said second cause of action.

IV.

Defendant denies paragraph five of said second cause of action.

V.

Defendant denies paragraph six of said second cause of action.

VI.

Defendant denies paragraph seven of said second cause of action.

VII.

Defendant further alleges that on the 24th day of July, 1911, said contract hereinbefore mentioned was terminated and cancelled by defendant for the reason that defendant considered plaintiff's services and work unprofitable and undesirable and no longer needed by defendant, and notified plaintiff on July 24, 1911, that said contract was terminated and that plaintiff's services for defendant were to cease immediately upon receipt of notice by plaintiff.

VIII.

Defendant further alleges that plaintiff has performed no work, labor or services for defendant since notice of the termination of said contract was given to plaintiff by defendant and that all work, labor and services performed by plaintiff under and pursuant to the terms of said contract have been fully paid for by defendant.

WHEREFORE, Defendant demands judgment against the plaintiff for its costs and disbursements incurred in this action.

COLE & COLE,
Attorneys for Defendant.

UNITED STATES OF AMERICA,

District of Oregon,

Multnomah County—ss.

I, L. W. Carnahan, being first duly sworn, depose and say, that I am the General Agent within the State of Oregon for defendant in the above entitled action;

and that the foregoing Answer is true as I verily believe.

(Sgd.) L. W. CARNAHAN.

Subscribed and sworn to before me this 16th day of Dec. 1911.

BARTLETT COLE,

Notary Public for the State of Oregon.

[Endorsed]: Answer. Filed December 18, 1911.

G. H. MARSH,

Clerk.

And afterwards, to wit, on the 23 day of January, 1912 there was duly filed in said Court, a Motion for Judgment on the Pleadings, in words and figures as follows to wit:

[Motion for Judgment on the Pleadings.]

*In the District Court of the United States, for the
District of Oregon.*

J. A. CRESSEY,

Plaintiff,

vs.

INTERNATIONAL HARVESTER COMPANY
OF AMERICA, a corporation,

Defendant.

Comes now the above named defendant, by its attorneys, Cole & Cole, and moves the above entitled court that judgment be entered in favor of the defendant and against the plaintiff as demanded in defendant's answer.

COLE & COLE,
Attorneys for Defendant.

[Endorsed]: Motion. Filed Jan. 23, 1912.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on Monday, the 29 day of February, 1912, the same being the 89 Judicial day of the Regular November, 1911, Term of said Court; Present: the Honorable R. S. BEAN, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

[Order Sustaining Motion for Judgment on the Pleadings.]

*In the District Court of the United States, for the
District of Oregon.*

J. A. CRESSEY,

vs.

INTERNATIONAL HARVESTER COMPANY
No. 3863. February 19, 1912.

This cause heretofore submitted on motion of defendant for judgment on the pleadings came on regularly at this time for decision of the court, and thereupon, after due consideration, it is ordered that said motion be and the same is hereby sustained.

And afterwards, to wit, on Thursday, the 29 day of February, 1912, the same being the 98 Judicial day of the Regular November, 1911, Term of said Court; Present: the Honorable R. S. BEAN, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

[Judgment Entered February 29, 1912.]

*In the District Court of the United States, for the
District of Oregon.*

J. A. CRESSEY,

Plaintiff,

vs.

INTERNATIONAL HARVESTER COMPANY
OF AMERICA, a corporation,

Defendant.

No. 3863. February 29, 1912.

WHEREAS The above named defendant, International Harvester Company of America, having moved the above entitled court for a judgment on the pleadings in favor of the defendant and against the plaintiff, as demanded in defendant's answer, and the court having sustained said motion,

NOW THEREFORE, IT IS HEREBY CONSIDERED, ORDERED AND ADJUDGED That defendant, International Harvester Company of America, do have and recover of and from plaintiff, J. A. Cressey, its costs and disbursements incurred in this action, taxed at \$..... and that execution issue therefor.

And afterwards, to wit, on Monday, the 22 day of April, 1912, the same being the 43 Judicial day of the Regular March, 1912, Term of said Court; Present: the Honorable R. S. BEAN, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

[Order Granting Leave to File Second Amended
Complaint.]

*In the Circuit Court of the United States, for the
District of Oregon.*

J. A. CRESSEY,

Plaintiff,

vs.

INTERNATIONAL HARVESTER COMPANY

No. 3863. April 22, 1912.

This cause heretofore submitted upon motion for leave to file amended complaint came on regularly at this time for decision of the court, and thereupon, after due consideration, it is ordered that the order for judgment heretofore entered herein be and the same is hereby vacated and set aside, and leave granted plaintiff to file amended complaint; and it is further ordered that defendant have and hereby is granted ten days to file its answer herein.

And afterwards, to wit, on the 22 day of April, 1912, there was duly filed in said Court, a Second Amended Complaint, in words and figures as follows to wit:

[Second Amended Complaint.]

*In the Federal Court of the United States, for the
District of Oregon.*

J. A. CRESSEY,

Plaintiff,

vs.

INTERNATIONAL HARVESTER COMPANY
OF AMERICA, a corporation,
Defendant.

No. 3863.

Now comes the plaintiff and for a Second Amended Complaint, filed herein by permission of the court, and for causes of action against the said defendant, complains and alleges:

I.

For a First Cause of Action:

1. That defendant now is, and at all the times hereinafter mentioned, was a corporation duly organized and existing under and by virtue of the laws of the State of Wisconsin.

2. That during all said time, defendant corporation was engaged in the manufacture, sale and distribution of farm and agriculture implements and machinery throughout the United States. That in the conduct of its business, certain specific territory was assigned to a general agent to whom was intrusted the entire management of its business in that territory, and which general agent was authorized to appoint, with the approval of the company, sub-agents, whose duties were to make contracts with local dealers for the handling, sale and distribution of defendant's machinery; and to also appoint special sales agents to travel from place to place in the territory, setting up and demonstrating defendant's machines and assisting the local agents in consummating sales; to also appoint other agents to look after, collect, re-

new and secure its commercial paper. That the services of the latter class, or the collection agents, were required by defendant company principally from August until on or about January 1st following, but it was the practice and custom of said defendant to retain in its respective general agencies in exclusively farming districts such as Eastern South Dakota, one or two of its most competent and desirable collectors, who were kept in the field looking after its paper and collections throughout the entire year. It was also the custom and practice of said defendant company in its general agency in South Dakota to make annual contracts with its collecting agents during the months of July or August of each year, always reserving the right in said contract for its termination, by the agent or the company upon either giving notice to the other to that effect. According to its further custom and practice, said contracts were made on the printed forms provided by defendant, such as Exhibit "A" and "B" hereto annexed and made a part of this complaint. And while it was also the universal practice and custom of said defendant company, in South Dakota, for a long time prior thereto and at all the times mentioned in this complaint to pay its collecting agents a bonus or commission over and above the fixed salary stated in said printed contract, provided the agent reached a certain standard set by the company, and kept his expenses below a fixed limit, said defendant company, according to its said custom, and for its own special reason never incorporated the

agreement to pay said commission or bonus in its said printed contract for the stated salary. It was also the custom and practice of said defendant company in its general agency in South Dakota, through its general agent, J. C. Sheldon, not to pay its collection agents a fixed salary exceeding \$100. per month; that on account of plaintiff being in the company's employ for many years, and being considered by said company a competent and desirable man, in July 10th, 1908, he was employed as such collection agent at a fixed salary \$125.00, in addition to a bonus or commission as hereinafter stated, with the agreement that in reporting his expenses he should include in his voucher to the company, his salary of \$100. per month and immediately after the receipt of said voucher at the general office in Chicago, the company would remit directly to him the \$25.00 in addition to the \$100. paid at the general agent's office; and in accordance with the agreement and understanding, plaintiff did include in his vouchers to the general agent, his salary, \$100, per month, which was paid in addition to the \$25.00 as called for in the contract.

That in the agreement represented by said printed form, and in accordance with the universal custom and practice, of said defendant and its agents, the latter were not to be engaged in any business, nor to be employed by any other person or company while in defendant's employ. And according to said agreement, its collection agents were paid a fixed salary and all their necessary expenses, they being the

judges of the necessity of such expense; and according to said printed agreement and the recognized custom and practice of defendant and its collection agents, the latter were not required to work more than the customary day of eight hours, nor on holidays or Sundays.

3. That on or about July 1st, 1908, said defendant through its general agent, J. C. Sheldon, at Sioux Falls, S. D., solicited plaintiff to enter its employ as such collection agent, requesting him to sign one of its printed contracts, at a fixed salary of \$125. per month. At that time, plaintiff was familiar with the defendant company's said custom of paying said bonus or commission, and as an inducement and consideration for plaintiff's signing the said contract, said defendant through its said general agent promised and agreed that if plaintiff would sign said contract and enter into its employ, and continue therein during the balance of 1908 and all of 1909, it would pay to him in addition to the fixed salary as stated in said printed contract, a bonus or commission per the year of 1909, as more specifically set out in the following paragraph: said general agent then and there delivering to plaintiff a printed statement of said schedule, a copy of which is hereto annexed, marked Exhibit "C" and made a part of this complaint.

That relying absolutely upon defendant's promise and agreement to pay the said bonus or commission as aforesaid, and as defendant then and there well knew, plaintiff signed one of defendant's printed con-

tracts, wherein the fixed salary is stated at \$125.00, a copy of which contract is hereto annexed, marked Exhibit "A". That \$125.00 per month was not the real consideration for the execution and delivery of said contract, but was only a part thereof, said bonus or commission being the real incentive and consideration for plaintiff's entering into defendant's employ, which said defendant then and there well knew; and had plaintiff known at that time, or at any time prior to January 1st, 1910, that defendant would not pay the said bonus or commission, he would have discontinued in its employ, all of which the defendant well knew; and defendant also well knew that plaintiff's services were worth more than \$3,000. per year.

4. That at the time of the signing of said printed agreement, and at the execution and delivery thereof, and in consideration of plaintiff's signing and executing the same, and as an inducement for his signing and executing said contract, said defendant then and there promised and agreed that if plaintiff would use extraordinary efforts in the handling and collection of its commercial paper, and would reduce his personal expenses to the limit fixed in the following schedule, and would devote extra time to the collection and securing of said paper, and the performance of other services for defendant outside of, and beyond that required by said written contract, such as working over time on holidays, Sundays, nights, and work on desperate claims or those considered uncollectable, and remained in its employ un-

til January 1st, 1910, and further that if plaintiff collected desperate claims aggregating \$2,500. between the dates of January 1st, 1909 and January 1st, 1910, and that the total cost and expense to the defendant for the collection of its paper in cash, or secured notes, which did not exceed the following schedule, plaintiff was to receive as a commission or bonus, the difference between the amount fixed by said schedule and the actual cost and expense to defendant, viz:

For the first 8 months of the year. That is, from January 1st to September 1st, 1909.

Per cent cost on cash collected	7 per cent
Per cent cost on claims secured	5 per cent

For the four months of the year from September 1st, 1909, to January 1st, 1910.

Per cent cost on cash collected	2 per cent
Per cent cash on claims secured	2 per cent

5. That relying upon the said promise and agreement of the said defendant, plaintiff signed the foregoing written contract and entered into the service of said defendant company. That aside from discharging the duties required of him by said written contract, he devoted to said employment almost every day, extra time, and also devoted part of many nights, holidays and Sundays and for the purpose of keeping his personal expenses down, at a great inconvenience to himself, and at the impairment of his health, made a large portion of said collections without incurring any expense for traveling by train or livery, all for the purpose of keeping his personal expenses within the

above schedule, and for the purpose of collecting the amount of desperate claims hereinafter stated, and also in anticipation of earning said bonus or commission remained in defendant's service during the year 1909. And that by reason of said extraordinary service, labor and economy, all of which were outside of the regular contract, plaintiff was enabled to attain the following results in collecting and securing the paper of said company in said territory, viz:

Total amount of cash collected from January 1st, 1909 to September 1st, 1909..... 22,373.53

Total amount of notes and claims of said Company in said territory renewed and secured during said period 12,340.05

Total amount of expense incurred by plaintiff in making said collections and procuring said renewals, including his salary during said period..... 1,590.41

Total amount of cash collected from September 1st, 1909, to January 1st, 1910.....112,140.29

Total amount of notes and claims of said Company in said territory renewed and secured during said period 11,290.24

Total amount of expense incurred by plaintiff in making the said collections and procuring said renewals, including his salary during said period..... 884.47

6. That during said year of 1909 ,plaintiff collect-

ed more than \$4000. of desperate claims belonging to said defendant Company, and claims that were considered by said Company as practically uncollectible.

That during all of said period, plaintiff sent in weekly reports of his work in accordance with said schedule showing on said reports in detail the work done for the previous week, the notes secured or collected, and also the desperate claims collected or secured.

7. That by reason of said cash collections and the renewing and securing of defendant's paper as aforesaid, plaintiff earned as said commission and bonus over and above his actual expense and costs to the Company, including his salary, according to said contract and schedule, the sum of Two Thousand One Hundred Seventy-two Dollars (\$2,172.78) and Seventy-eight cents which became due and payable on January 1st, 1910.

8. That no part of said claim has been paid except the sum of Eighty-nine Dollars and Eighty-two cents (\$89.82) paid thereon by the Company on or about February 10th, 1910, leaving a balance still due plaintiff from said Company on said claim, in the sum of Two Thousand Eighty-two Dollars and Ninety-six cents (\$2,082.96) together with interest thereon at 7 per cent per annum from January 1st, 1910, as provided by the law and statute of the State of South Dakota where the said contract was made and delivered.

9. That in accordance with said agreement and

on or about January 1st, 1910, plaintiff forwarded to defendant an itemized statement of the bonus or commission earned by him as aforesaid, and demanded of said defendant that it pay him the said sum of \$2,-172.78, in reply to which demand, said defendant recognized the agreement to pay a bonus or commission, but denied that there was due plaintiff thereon any other or further sum than \$89.82, for which amount defendant forwarded to plaintiff, a remittance for which sum plaintiff gave defendant credit, leaving a balance of \$2,082.96 still due and payable on said contract, which said defendant has ever since refused and neglected to pay.

10. Plaintiff further alleges that on or about August 24th, 1909, in accordance with defendant's said custom and practice in having its collection agents sign its said printed form of contract annually in July or August, defendant through its said general agent requested plaintiff to sign its printed form of contract, stating that the same in no manner affected plaintiff's said contract relating to the commission or bonus as aforesaid. That with the same promises and agreements to pay said bonus or commission that were made at the time plaintiff signed Exhibit "A", as hereinbefore alleged, and in anticipation and contemplation of said bonus or commission, which plaintiff was then earning, and which said defendant agreed should be paid to him in accordance with the previous agreement, and in reliance upon said promises and agreements, and with knowledge also of the

custom and practice of said company not to include its agreement and promise to pay said commission or bonus in its printed form of contract plaintiff signed its written form of contract wherein defendant promised to pay him a fixed salary of \$137.50 a month, provided he would make his vouchers for said salary monthly for only \$100, and after the same was received by the company, and after he was paid the \$100 a further remittance of \$37.50 would be sent directly from the main office of the company in Chicago. That said vouchers were so made and afterwards paid by defendant as aforesaid. A copy of which contract is hereto annexed, marked Exhibit "B" and made a part of this complaint.

That said printed form of contract did not express the entire agreement, and did not express the real consideration for plaintiff's service, the real consideration being in addition to said fixed salary, the bonus or commission which he had then earned and was earning. And said defendant, at the time, well knew that plaintiff would not have signed said printed form of contract had he known defendant would refuse to pay said bonus or commission as aforesaid. And had plaintiff known, at the time, that defendant would afterwards claim that this contract, in any manner affected his prior contract with defendant, he would not have signed it as the defendant then well knew.

For a Second Cause of Action:

1. Plaintiff refers to and hereby makes paragraph "I" of his first cause of action a part and parcel of this cause of action.

2. That on November 15th, 1910, plaintiff entered into a contract in writing with said defendant at Portland, Oregon, wherein and whereby he was employed by said defendant in the capacity of a collector of its commercial paper at a salary of One Hundred Twenty-five Dollars (\$125) per month which employment was for an indefinite period.

3. In said contract it was therein provided: Either party may terminate this agreement by giving 30 days' notice to the other party. The first party (defendant) may terminate the agreement, at any time for neglect of duty, refusal to follow instructions, or should it consider second party's work unprofitable or undesirable, in which event compensation shall cease the day and date the agreement is terminated, as more fully appears from a copy thereof hereto annexed marked "Exhibit "D" and made a part of this Amended Complaint.

4. That notwithstanding the terms and conditions of said contract, said defendant on or about July 24, 1911 notified plaintiff that his employment with the defendant ceased from that date, and that prior to said notification he had received no intimation, knowledge or notice that defendant intended to dispense with his services. That the relation between plaintiff and defendant was identically the same on July 24th, 1911 that it was at all times from and after November 15th, 1910, and his services were as necessary and profitable to said defendant upon July 24th, 1911 as at any time prior thereto.

5. That contrary to the terms of said contract, plaintiff received no prior notice of defendant's intention to terminate said contract; that he was arbitrarily, capriciously and without cause discharged from defendant's employ.

6. That said plaintiff did not neglect his duty to defendant, he did not refuse to follow instructions, that his work and services were profitable and desirable to said defendant and that it had no cause or reason whatever for discharging him without giving the 30 days notice as provided in said contract.

7. That by reason of said unlawful termination to said contract without giving the said 30 days' notice, said defendant is indebted to plaintiff in the sum of One Hundred Twenty-five Dollars (\$125).

8. That during the month immediately following said discharge it was impossible for plaintiff to procure other employment and said month was a total loss to him by reason of his not receiving said notice as aforesaid.

WHEREFORE, Plaintiff prays judgment against the said defendant for the sum of Two Thousand Eighty-two Dollars and ninety-six cents (\$2,082.96) and interest thereon at 7 per cent since January 1st, 1910, together with the sum of One Hundred Twenty-five Dollars (\$125), and interest thereon at 6 per cent since August 1st, 1911, together with costs and disbursements of this action.

Dated March 8, 1912.

S. A. Keenan.

STATE OF WASHINGTON,

County of King—ss.

S. A. Keenan being first duly sworn on his oath states that he is the attorney for the Plaintiff in the above entitled cause, that he has read the foregoing Second Amended Complaint and believes the same to be true, that this verification is not made by Plaintiff for the reason that he is at present absent from the county of King and State of Washington.

S. A. KEENAN.

Subscribed and sworn to before me this 8th day of March, 1912.

[Notarial Seal.]

ALFRETTE M. HOFFSTATER,

Notary Public in and for the State of Washington,
residing at Seattle.

“EXHIBIT A.”

“THIS AGREEMENT, entered into this 13th day of July, 1908, by and between the International Harvester Company of America, (Incorporated) party of the first party, and J. A. Cressey of Watertown, State of S. D., party of the second part.

WITNESSETH, That the first party hereby hires the second party to serve and to perform such duties and at such places as it may from time to time direct; and the second party agrees to faithfully perform to the best of his ability all the duties and responsibilities of such service, and to devote his whole and undivided time to the party of the first part during the continuance of this contract, and not to en-

gage, or to be engaged, nor to be interested in other business during the existence of this contract.

IN CONSIDERATION the first party will pay to the second party at the rate of One hundred twenty-five and no 100 Dollars (\$125.00) per month and necessary traveling expenses actually incurred in the business while away from Aberdeen, S. D. his home or usual place of residence.

This contract to be in force from 15th day of August, 1908, until canceled, which may be done by either party hereto, without liability for damage, by giving written notice.

And it is further agreed that the second party is to furnish at his own expense to first party a bond for the sum of \$2000.00 in some surety company, to be designated by the first party.

INTERNATIONAL HARVESTER COMPANY
OF AMERICA,

Approved at Chicago, Ill.,
July 18th, 1908.

By J. C. Sheldon.

International Harvester

J. A. Cressey.

Company of America,

By J. N. Coburn."

EXHIBIT "B".

THIS AGREEMENT, entered into this 10th day of August, 1909, by and between the International Harvester Company of America, (Incorporated), party of the first part, and J. A. Cressey, of Aberdeen, State of S. D. party of the second part.

WITNESSETH: That the first party hires the

second party to serve and perform such duties and at such places as it may from time to time direct; and the second party agrees to faithfully perform to the best of his ability all the duties and responsibilities of such service, and to devote his whole and undivided time to the party of the first part during the continuance of this contract. Second party agrees to remit promptly to first party all money collected for first party.

IN CONSIDERATION the first party will pay to the second party at the rate of One hundred thirty-seven and 50/100 Dollars (\$137.50) per month and necessary traveling expenses actually incurred in the business while away from Aberdeen, S. D. his home or usual place of residence.

This contract to be in force from 1st day of August, 1909 until cancelled, which may be done by either party hereto, without liability for damage, by giving written notice.

And it is further agreed that the said second party is to furnish at his own expense to first party a bond for the sum of \$2,000.00 in some surety company, to be designated by the first party.

INTERNATIONAL HARVESTER COMPANY
OF AMERICA,

By J. C. Sheldon.

J. A. Cressey.

Approved at Chicago, Ill., Aug. 13, 1909.

INTERNATIONAL HARVESTER COMPANY
OF AMERICA,

By J. N. Coburn."

EXHIBIT "C."

Applicable to the season of 1909, with the exception that we have made the standard for Mr. Cressey and Mr. Williams for 1909 as follows:

For the first 8 months of the year, that is, from January 1st, to September 1st:

Per cent cost on cash collected7 per cent

Per cent cost on cash and claims secured....5 per cent

For the 4 months of the year from September 1st, to January 1st:

Per cent cost on cash collected2 per cent

Per cent cost on cash and claims secured 2 per cent

Desperate claims average for the year\$2,500

We have made the standard for Mr. Reed for 1909 as follows:

For the first 8 months of the year, that is, from January 1st, to September 1st:

Per cent cost on cash collected.....10 per cent

Per cent cost on cash and claims secured.... 7 per cent

For the 4 months of the year from September 1st, to January 1st:

Per cent cost on cash collected.....4 per cent

Per cent cost on cash and claims secured.....4 per cent

Desperate claims average for the year.....\$2500

EXHIBIT "D."

AGREEMENT, entered into this 15th day of November, 1910, between the International Harvester Company of America, (Incorporated) party of the first part, and J. A. Cressey, of Eugene, Oregon, party of the second part.

The party of the first part hereby agrees to employ the party of the second part as long as needed beginning November 15th, 1910, at the rate of \$125.00 Dollars per month and his necessary and legitimate traveling expenses when away from Eugene, Oregon.

The party of the second part hereby agrees to devote all of his time and ability to the transaction of first party's business as may be directed, and also agrees to make prompt, complete and accurate reports of his work and expenses to said First party. Second party agrees to remit promptly to first party all money collected for first party.

The agreement is subject to the following conditions: Second party to furnish first party a surety bond at any time if requested, for the sum of \$2,--000.00, in the form to me designated by first party, at his own expense. Either party may terminate this agreement by giving thirty days' notice to the other party. The first party may terminate the agreement at any time for neglect of duty, refusal to follow instructions, or should it consider second party's work unprofitable or undesirable, in which event compensation shall cease the day and date the agreement is terminated.

Should the time of service be continued by first party beyond the time specified, it is to be on the same terms and conditions as above.

INTERNATIONAL HARVESTER COMPANY
OF AMERICA,

By L. W. Carnahan.
J. A. Cressey.

[Endorsed]: Second Amended Complaint. Filed
Apr. 22, 1912.

A. M. CANNON,
Clerk.

And afterwards, to wit, on the 2 day of May, 1912,
there was duly filed in said Court, a Motion to
Strike in words and figures as follows to wit:

[Motion to Strike Second Amended Complaint.]

*In the District Court of the United States, for the
District of Oregon.*

J. A. CRESSEY,

Plaintiff,

vs.

INTERNATIONAL HARVESTER COMPANY
OF AMERICA, a corporation,

Defendant.

Comes now the defendant in the above entitled
action and moves the above entitled court that the
following portions of plaintiff's second amended com-
plaint be stricken out for the reasons stated.

1. Beginning with the word "that" in line 21 on
page 1, and ending with the word "territory" in line
24 on page 1, for the reason that the same is immateri-
al and redundant.

2. Beginning with the word "and" in line 24 on
page 1 and ending with the word "paper" in line 4 of
page 2, for the reason that the same is immaterial and
redundant.

3. Beginning with the word "that" in line 4 on
page 2 and ending with the word "year" in line 12 on

18. Beginning with the word "that" in line 19 on page 4 and ending with the word "knew" in line 21 on page 4, for the reason that the same is immaterial and redundant.

19. Beginning with the word "that" in line 24 on page 4 and ending with the word "knew" in line 30 on page 4, for the reason that the same is immaterial and redundant.

20. Beginning with the word "and" in line 30 on page 4 and ending with the word "employ" in line 2 on page 5, for the reason that the same is immaterial and redundant.

21. Beginning with the word "all" in line 2 on page 5 and ending with the word "year" in line 4 on page 5, for the reason that the same is immaterial and redundant.

22. Beginning with the word "and" in line 14 on page 5 and ending with the word "uncollectable" in line 18 on page 5, for the reason that the same is immaterial and redundant.

23. Beginning with the word "that" in line 5 on page 6 and ending with the word "company" in line 8 on page 6, for the reason that the same is immaterial and redundant.

24. Beginning with the word "that" in line 8 on page 6 and ending with the word "contract" in line 9 on page 6, for the reason that the same is immaterial and redundant.

25. Beginning with the word "he" in line 9 on page 6 and ending with the word "1909" in line 20 on

page 6, for the reason that the same is immaterial and redundant.

26. Beginning with the word "and" in line 20 on page 6 and ending with the word "contract" in line 22 on page 6, for the reason that the same is immaterial and redundant.

27. That paragraph 6 on page 7 be stricken out for the reason that the same is immaterial and redundant.

28. That paragraph 7 on page 7 be stricken out for the reason that the same is immaterial and redundant.

29. Beginning with the word "that" in line 2 on page 8 and ending with the word "commission" in line 7 on page 8, for the reason that the same is immaterial and redundant.

30. Beginning with the word "but" in line 8 on page 8 and ending with the word "pay" on page 8, line 13, for the reason that the same is immaterial and redundant.

31. Beginning with the word "in" in line 15 on page 8 and ending with the word "August" in line 18 on page 8, for the reason that the same is immaterial and redundant.

32. Beginning with the word "stating" in line 19 on page 8 and ending with the word "aforesaid" in line 21 on page 8, for the reason that the same is immaterial and redundant.

33. Beginning with the word "that" in line 21 on page 8 and ending, with the word "agreements" in line 29 on page 8, for the reason that the same is im-

material and redundant.

34. Beginning with the word "and" in line 29 on page 8 and ending with the word "contract" in line 2 on page 9, for the reason that the same is immaterial and redundant.

35. Beginning with the word "provided" in line 3 on page 9 and ending with the word "Chicago" in line 7 on page 9, for the reason that the same is immaterial and redundant.

36. Beginning with the word "that" in line 7 on page 9 and ending with the word "aforesaid" in line 8 on page 9, for the reason that the same is immaterial and redundant.

37. Beginning with the word "That" in line 11 on page 9 and ending with the word "service" in line 13 on page 9, for the reason that the same is immaterial and redundant.

38. Beginning with the word "the" in line 13 on page 9 and ending with the word "earning" in line 15 on page 9, for the reason that the same is immaterial and redundant.

39. Beginning with the word "and" in line 15 on page 9 and ending with the word "knew" in line 22 on page 9, for the reason that the same is immaterial and redundant.

40. Beginning with the word "and" in line 14 on page 10 and ending with the word "thereto" in line 20 on page 10, for the reason that the same is immaterial and redundant.

41. That paragraph 5 on page 10 be stricken out

for the reason that the same is immaterial and redundant.

COLE & COLE,

Attorneys for Defendant.

[Endorsed]: Motion. Filed May 2, 1912.

A. M. CANNON,

Clerk U. S. District Court.

And afterwards, to wit, on Monday, the 20 day of May, 1912, the same being the 67 Judicial day of the Regular March, 1912, Term of said Court; Present: the Honorable R. S. BEAN, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

[Order Sustaining Motion to Strike.]

*In the District Court of the United States, for the
District of Oregon.*

J. A. CRESSEY,

v.

INTERNATIONAL HARVESTER COMPANY

May 20, 1912.

No. 3863.

This cause heretofore submitted on motion to strike parts of Second Amended Complaint came on regularly at this time for the ruling of the Court and thereupon, after due consideration, It is Ordered that said motion to strike be and hereby is granted.

And afterwards, to wit, on the 17 day of June, 1912, there was duly filed in said court, a Demurrer to Second Amended Complaint, in words and figures as follows to wit:

[Demurrer to Second Amended Complaint.]

*In the District Court of the United States, for the
District of Oregon.*

J. A. CRESSEY,

Plaintiff,

vs.

INTERNATIONAL HARVESTER COMPANY
OF AMERICA, a corporation,

Defendant.

Comes now the defendant in the above entitled action and demurs to plaintiff's second amended complaint as follows:

I.

Defendant demurs to plaintiff's first cause of action set out in plaintiff's second amended complaint for the reason and upon the ground that the allegations contained in said first cause of action do not state facts sufficient to constitute a cause of action against defendant.

II.

Defendant demurs to plaintiff's second cause of action for the reason and upon the ground that the allegations contained in said second cause of action do not state facts sufficient to constitute a cause of action against defendant herein.

COLE & COLE,
Attorneys for Defendant.

[Endorsed]: Demurrer. Filed June 17, 1912.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on Monday, the 24 day of June, 1912, the same being the 95 Judicial day of the Regular March, 1912, Term of said Court; Present: the Honorable R. S. BEAN, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

[Order Sustaining Demurrer to Second Amended Complaint.]

*In the Circuit Court of the United States for the
District of Oregon.*

J. A. CRESSEY,

Plaintiff,

vs.

INTERNATIONAL HARVESTER COMPANY.

No. 3863.

June 24, 1912.

This cause came on regularly at this time on demurrer to plaintiff's second amended complaint; whereupon, by consent of parties, demurrer submitted without argument, and thereupon after due consideration it is ordered that demurrer to second amended complaint be and the same is hereby sustained, to which ruling and order of the court plaintiff excepts.

And afterwards, to wit, on the 3 day of July, 1912, there was duly filed in said Court, a Notice, in words and figures as follows to wit:

[Notice of Application for Entry of Judgment.]

*In the District Court of the United States, for the
District of Oregon.*

J. A. CRESSEY,

Plaintiff,

vs.

INTERNATIONAL HARVESTER COMPANY
OF AMERICA, a corporation,

Defendant.

To the above named plaintiff, and to S. A. Keenan,
his attorney:

PLEASE TAKE NOTICE That on the 8th day of
July, 1912, defendant in the above entitled action will
apply to the above entitled court for judgment
against plaintiff, as demanded in defendant's answer,
by default of plaintiff in further pleading.

COLE & COLE,
Attorneys for Defendant.

[Endorsed]: Notice. Filed July 3, 1912.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on Monday, the 8 day of July,
1912, the same being the 6 Judicial day of the
Regular July, 1912, Term of said Court; Present:
the Honorable R. S. BEAN, United States Dis-
trict Judge presiding, the following proceedings
were had in said cause, to-wit:

[Final Judgment.]

*In the District Court of the United States, for the
District of Oregon.*

J. A. CRESSEY,

Plaintiff,

vs.

INTERNATIONAL HARVESTER COMPANY
OF AMERICA, a corporation,

Defendant.

WHEREAS, the defendant, International Harvester Company of America, has filed its remurrer to each of the separate causes of acti a set forth in plaintiff's second amended complaint, and

WHEREAS said demurrer was heretofore submitted to the court on the 24th day of June, 1912, and

WHEREAS the court having heretofore on the 24th of June, 1912, sustained defendant's demurrer to each of the separate causes of action set forth in plaintiff's second amended complaint, and

WHEREAS plaintiff has failed and refused to plead further, and has not made any further appearance in said action in any manner,

NOW, THEREFORE, on motion of defendant that judgment be entered, IT IS HEREBY CONSIDERED, ORDERED AND ADJUDGED That plaintiff, J. A. Cressey, take nothing in the above entitled action, and that defendant, International Harvester Company of America, go hence without day, and have and recover of and from plaintiff its costs and disbursements incurred in the above entitled ac-

tion taxed at &..... and that execution issue therefor.

And afterwards, to wit, on the 17 day of July, 1912, there was duly filed in said Court, a Petition for Writ of Error, in words and figures as follows to wit:

[Petition for Writ of Error.]

*In the District Court of the United States, for the
District of Oregon.*

J. A. CRESSEY,

Plaintiff,

vs.

INTERNATIONAL HARVESTER COMPANY
OF AMERICA, a corporation,

Defendant.

No. 3863.

Now comes J. A. Cressey, Plaintiff herein, and says that on or about the 8th day of June, 1912, this court entered judgment herein in favor of the defendant and against this plaintiff in which judgment and the proceedings had prior thereunto in this cause certain errors were committed to the prejudice of this plaintiff, all of which will more fully and in detail appear from the assignment of errors which is filed with this petition.

WHEREFORE, this plaintiff prays that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of errors so complained of, and that a

transcript of the record, proceedings and papers in this cause, duly authenticated may be sent to said Circuit Court of Appeals.

Dated July 10, 1912.

S. A. KEENAN,
Attorney for Plaintiff.

[Endorsed]: Petition for Writ of Error. Filed July 17, 1912.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 17 day of July, 1912, there was duly filed in said Court, Assignments of Error, in words and figures as follows to wit:

[Assignments of Error.]

*In the District Court of the United States, for the
District of Oregon.*

J. A. CRESSEY,

Plaintiff,

vs.

No. 3836.

INTERNATIONAL HARVESTER COMPANY
OF AMERICA, a corporation,
No. 3863.

Defendant.

J. A. CRESSEY, Plaintiff in this action in connection with, and as a part of his petition for a Writ of Error filed herein, making the following assignment of errors, which he avers were committed by the court in the rendition of the judgment against this plaintiff

appearing upon the record herein, that is to say:

1. The court erred in sustaining the defendant's motion to strike certain parts and portions of his Second Amended Complaint.

2. The court erred in holding and deciding that plaintiff's Second Amended Complaint did not state facts sufficient to constitute a cause of action against the defendant.

3. The court erred in sustaining the demurrer of defendant to plaintiff's Second Amended Complaint.

4. The court erred in rendering judgment against this plaintiff upon the sustaining of the demurrer of defendant.

5. The court rendered judgment against plaintiff, whereas, judgment ought to have been rendered in favor of the plaintiff and against the defendant.

WHEREFORE, Plaintiff prays that the said judgment may be reversed.

Dated July 10, 1912.

S. A. KEENAN,
Attorney for Plaintiff.

[Endorsed]: Assignments of Error. Filed July 17, 1912.

A. M. CANNON,
Clerk.

And afterwards, to wit, on the 17 day of July, 1912, there was duly filed in said Court, an Order Allowing Writ of Error, in words and figures as follows to wit:

[Order Allowing Writ of Error.]

*In the District Court of the United States, for the
District of Oregon.*

J. A. CRESSEY,

Plaintiff,

vs.

No. 3863.

INTERNATIONAL HARVESTER COMPANY
OF AMERICA, a corporation,
Defendant.

No. 3863.

This 17 day of July, 1912, came the plaintiff by his attorney, and filed herein and presented to the court his petition praying for the allowance of a Writ of Error, and Assignment of Errors intended to be urged by him, praying, also, that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and that such other and further proceedings may be had as may be proper in the premises.

On consideration thereof the court does allow the Writ of Error upon the plaintiff giving bond according to law, in the sum of \$500.00, which it shall operate as a supersedeas bond.

Dated July 10, 1912.

CHAS. E. WOLVERTON,

Judge.

[Endorsed]: Order Allowing Writ of Error. Filed July 17, 1912.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 10 day of August, 1912,
there was duly filed in said Court, a Bond on
Writ of Error, in words and figures as follows to
wit:

[Bond on Writ of Error.]

*In the District Court of the United States, for the
District of Oregon.*

J. A. CRESSEY,

vs.

Plaintiff,

No. 3863.

INTERNATIONAL HARVESTER COMPANY
OF AMERICA, a corporation,

Defendant.

No. 3863.

Know All Men By These Presents, That I, J. A. Cressey, as principal, and National Surety Company, a New York corporation, duly authorized and empowered to become surety on bonds in the state of Oregon, as surety, are held and firmly bound unto the defendant in error, International Harvester Company of America, in the full and just sum to be paid to the said defendant in error, International Harvester Company of America, its certain attorneys, executors, administrators and assigns; to which payment well and truly to be made, we bind ourselves, our heirs, exe-

cutors and administrators, jointly and severally by these presents. Sealed with our seals and dated this 6th day of August, in the year of our Lord one thousand and twelve.

Whereas, lately at a District Court of the United States for the District of Oregon, in a suit pending in said court, between J. A. Cressey, plaintiff, and International Harvester Company of America, defendant, a judgment was rendered against the said J. A. Cressey, and the said J. A. Cressey having obtained a writ of error and filed a copy thereof in the clerk's office of said court to reverse the judgment in the aforesaid suit, and a citation directed to the said International Harvester Company of America citing and admonishing him to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in said circuit on the day of August next.

Now, the condition of the above obligation is such that if the said J. A. Cressey shall prosecute said writ of error to effect and answer all damages and costs if he fails to make the said plea full force and virtue.

J. A. CRESSEY, [Seal.]

NATIONAL SURETY COMPANY, [Seal.]

By Frank E. Smith, Attorney in Fact.

Sealed and delivered in the presence of

C. A. E. Whitton.

Approved by

Chas. E. Wolverton,

District Judge.

[Endorsed]: Bond. Filed August 10, 1912.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 14 day of August, 1912,
there was duly filed in said Court, a Writ of Error,
in words and figures as follows to wit:

[Writ of Error.]

*In the United States Circuit Court of Appeals for the
Ninth District.*

J. A. CRESSEY,

Plaintiff in Error,

vs.

INTERNATIONAL HARVESTER COMPANY
OF AMERICA, a corporation,
Defendant in Error.

THE UNITED STATES OF AMERICA,—ss.

THE PRESIDENT OF THE UNITED STATES
OF AMERICA.

To the Judge of the District Court of the United
States for the District of Oregon:

GREETING:

Because in the records and proceedings, as also in
the rendition of the judgment of a plea which is in
the District Court before the Honorable R. S. Bean,
one of you, between J. A. Cressey, Plaintiff and Plain-
tiff in Error, and International Harvester Co. of
America, a corporation, Defendant and Defendant in
Error, a manifest error hath happened to the great

damage of the said Plaintiff in Error, as by complaint doth appear; and we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, and, in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid, being then and there inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

WITNESS the HONORABLE EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States this 14 day of August, 1912.

A. M. CANNON,

Clerk of the District Court of the United States for the District of Oregon.

[Endorsed]: Writ of Error. Filed Aug. 14, 1912.

A. M. CANNON,

Clerk U. S. District Court.

And afterwards, to wit, on the 16 day of August, 1912, there was duly filed in said Court, a Citation on

Writ of Error, in words and figures as follows,
to wit:

[Citation on Writ of Error.]

UNITED STATES OF AMERICA,

District of Oregon—ss.

To International Harvester Co. of America and to
Cole & Cole, your attorneys of record:

GREETING:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the Circuit Court of the United States for the District of Oregon, wherein J. A. Cressey is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said District, this 14 day of August, in the year of our Lord, one thousand, nine hundred and twelve.

CHAS. E. WOLVERTON,

Judge.

[Endorsed]: Citation on Writ of Error. Filed
August 16, 1912.

A. M. CANNON,

Clerk U. S. District Court.

Due and personal service of the within citations on

writ of error admitted on this 16th day of August, A. D., 1912, in the city of Portland, Oregon.

INTERNATIONAL HARVESTER CO. OF AMERICA,

By Cole & Cole, its attorneys.

And afterwards, to wit, on Thursday, the 12 day of September, 1912, the same being theJudicial day of the Regular July, 1912, Term of said Court; Present: the Honorable CHAS. E. WOLVERTON, United States District Judge presiding, the following proceedings were had in said cause to wit:

[Order Enlarging Time to File Transcript.]

*In the District Court of the United States, for the
District of Oregon.*

J. A. CRESSEY,

Plaintiff,

vs.

THE INTERNATIONAL HARVESTER COMPANY OF AMERICA,

Defendant,

3863.

September 12, 1912.

Now, at this day, for good cause shown, it is ORDERED that the plaintiff's time for filing and docking the record on appeal in this cause in the United States Circuit Court of Appeals, Ninth Circuit, be and the same is hereby enlarged and extended sixty (60) days from this date.

CHAS. E. WOLVERTON,

Judge.

9

In The
United States Circuit Court of
Appeals for the Ninth Circuit.

J. A. CRESSEY,

Plaintiff in Error,

vs.

INTERNATIONAL HARVESTER COM-
PANY OF AMERICA, a corporation,

Defendant in Error.

IN ERROR TO THE DISTRICT COURT OF
THE UNITED STATES FOR THE
DISTRICT OF OREGON.

BRIEF FOR PLAINTIFF IN ERROR.

S. A. KEENAN,
Attorney for Plaintiff in Error.
Empire Building, Seattle, Washington

In The
United States Circuit Court of
Appeals for the Ninth Circuit.

J. A. CRESSEY,

Plaintiff in Error,

vs.

INTERNATIONAL HARVESTER COM-
PANY OF AMERICA, a corporation,
Defendant in Error.

IN ERROR TO THE DISTRICT COURT OF
THE UNITED STATES FOR THE
DISTRICT OF OREGON.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This cause comes here on Writ of Error to review the action of the District Court for the District of Oregon in entering judgment on the

pleadings against the plaintiff in error.

The suit is brought against the International Harvester Company of America to recover \$2,-082.96 due plaintiff as bonus or commission over and above a fixed salary of \$125 per month.

Aside from directing the court's attention to the averments of plaintiff's pleading, no further statement of the case would be of any assistance. His causes of action are found in his "Second Amended Complaint."

"The "Second Amended Complaint," in substance, contains the following allegations:

That the defendant is a corporation engaged in the manufacture, sale and distribution of farm and agricultural implements and machinery throughout the United States; that its business is done through general agents to whom certain territory is assigned, and that they, in turn appoint sales and collection agents who are assigned to certain districts in the general agent's territory; the various branches of its business, such as the appointment of local agents for the sale of its machinery, the setting up and demonstration of its various machines, the sales, and the collection of its commercial paper, was done through specialists or experts in the various lines of work; that plaintiff was an expert or specialist on collections and had been in the company's employ in that capacity for several years prior to the date of the contract in controversy in this suit; that

it had been the custom of the company for many years to make annual contracts with its collection agents during the month of July, and to also offer to each collection agent a commission or bonus over and above the amount stated in the written contract, on condition that he reached a standard fixed by a written schedule, delivered with the contract, which bonus or commission was never due or payable until the end of the calendar year; and in the territory of South Dakota where plaintiff was employed, the maximum amount paid collectors was \$100 per month and his actual traveling expenses; that plaintiff had been paid a larger amount per month than that, with the understanding and agreement that he should always report in his expenses, and salary at \$100 per month, after the receipt of which, the balance of his salary would be remitted to him; that on or about July 1st, 1908, plaintiff was requested by J. C. Sheldon, the general agent of the company to again enter into the company's employ as a collector; at that time it was agreed by and through said general agent that he was to receive a monthly salary of \$125 per month and his traveling expenses, and in addition thereto he was to receive a bonus or commission provided his total expenses during the year 1909, including his monthly salary of \$125 per month, did not exceed a certain per cent of costs as specified and set out in the following schedule, to-wit:

"Applicable to the season of 1909 with the

exception that we have made the standard for Mr. Cressy and Mr. Williams for 1909 as follows:

For the first 8 months of the year, that is, from January 1st, to September 1st,

Per cent cost on cash collected----- 7%

Per cent cost on cash and claims secured_ 5%

For the first 4 months of the year from September 1st, to January 1st,

Per cent cost on cash collected----- 2%

Per cent cost on cash and claims secured_ 2%

Desperate claims average for the year--\$2500

We have made the standard for Mr. Reed for 1909 as follows:

For the first 8 months of the year, that is, from January 1st to September 1st,

Per cent cost on cash collected-----10%

Per cent cost on cash and claims secured_ 7%

For the 4 months of the year from September 1st to January 1st,

Per cent cost on cash collected----- 4%

Per cent cost on cash and claims secured_ 4%

Desperate claims average for the year--\$2500,"

and provided further that during the year 1909 he collect at least \$2500 of desperate claims, and that he would remain in the company's employ from that time until January 1st, 1910; it is further alleged that said company, through its general agent, knew at that time that plaintiff's services were worth more than \$3000 per year, and that he would not enter into a contract to work for \$125 per month; that it was then and there specifically and in words agreed by plaintiff and said company through its general agent that if he did sign the company's customary "per-

sonal service agreement," the company would pay to him the said bonus or commission as aforesaid, which personal service agreement is as follows:

"Personal Service Agreement.

THIS AGREEMENT, entered into this 13th day of July, 1908, by and between the International Harvester Company of America (Incorporated), party of the first part, and J. A. Cressey of Watertown, State of S. D., party of the second part.

WITNESSETH, That the first party hereby hires the second party to serve and to perform such duties and at such places as it may from time to time direct; and the second party agrees to faithfully perform to the best of his ability all the duties and responsibilities of such service, and to devote his whole and undivided time to the party of the first part during the continuance of this contract, and not to engage, or to be engaged, nor to be interested in other business during the existence of this contract.

IN CONSIDERATION the first party will pay to the second party at the rate of One Hundred Twenty-five and no-100 Dollars (\$125.00) per month and necessary traveling expenses actually incurred in the business while away from Aberdeen, S. D., his home or usual place of residence.

THIS contract to be in force from 15th day of August, 1908, until canceled, which may be done by either party hereto, without liability for damage, by giving written notice.

And it is further agreed that the second party is to furnish at his own expense to first party a bond for the sum of \$2000.00 in some surety company, to be designated by the first party.

International Harvester Company of America,
By J. C. Sheldon,
J. A. Cressey.

Approved at Chicago, Ill.,
July 18th, 1908,
International Harvester
Company of America,
By J. N. Coburn."

and at the time said defendant, through its said general agent, requested that plaintiff, in making out his monthly statement, report his salary in at \$100 per month and after its receipt the company would remit to him \$25, the balance of said monthly salary which plaintiff agreed to; and his reports and remittances were made in accordance therewith; that relying upon the company's promise and agreement to pay the said bonus or commission, he signed the said writing and entered into the employ of said company and continued therein until January 1, 1910; that during all that time, he made written reports of the desperate claims collected and the amount due him according to said schedule and mailed the same to the company at the end of each month, and at the end of the period January 1, 1910, he mailed to the company a general itemized statement of the desperate claims collected, and of the commission or bonus due him in accordance with his contract, which amounted to \$2,172.78, and upon the receipt of that statement the company remitted \$89.82, claiming that that was all that was due him under his contract for bonus or commission; that plaintiff had no

knowledge or intimation that the company would, or that it intended to repudiate said agreement until after he received said remittance of \$89.82 as aforesaid; it is further alleged in said complaint that had plaintiff known that said company would not carry out its agreement to pay him said bonus or commission, he would not have entered into the company's employ as it then and there well knew. That in accordance with the custom aforesaid, on or about July 1, following, the company's said general agent requested plaintiff to sign another annual personal service agreement; that the same was signed with the same promises and agreements and understanding as to the bonus or commission that the former agreement was signed; that plaintiff then and there stated to said company through its general agent that he would not sign the same if it in any manner affected his said agreement for said bonus or commission, that said company then and there promised and agreed with plaintiff that if he would sign the said annual personal service agreement it would not in any manner affect his prior contract and agreement.

After plaintiff had finished his contract in South Dakota, he removed to the state of Oregon and entered into a written contract November 15, 1910, with the company for personal service in that state, in that contract it was provided that it might be terminated upon either party giving the other thirty days' notice; after this suit was brought, and without any cause whatever, the

company arbitrarily on July 24, 1911, discharged the plaintiff; plaintiff's second cause of action is based upon the company's failure to perform that contract and in said second cause of action seeks to recover \$125, one month's salary.

The foregoing is a very brief statement of the facts set out in plaintiff's complaint, practically all of which, on the defendant's motion was stricken out as immaterial and redundant on the ground and for the reason that the establishment of the parol agreement would be permitting parol evidence to vary the terms of a written contract.

SPECIFICATIONS OR ERRORS RELIED UPON.

Plaintiff in error contends that the lower court erred in the following particulars:

1. In sustaining the company's motion to strike from the complaint all the parts included in said motion.

2. The court erred in sustaining the company's demurrer to said Second Amended Complaint.

3. The court erred in not entering judgment in favor of the plaintiff in error.

POINTS AND AUTHORITIES.

THE PLEADINGS. In response to the company's motion, the original complaint was amended by setting out the name of the general agent. Hence, there is really but one Amended Complaint

in the case, it is designated "Second Amended Complaint." To it no answer was filed. The company moved to strike out practically all of it except the mere averments concerning the written agreement for personal service. (R., 37 to 43.) The court sustained that motion. (R., 43.) Its action thereon is the real error complained of in this court. Plaintiff maintains that he should be permitted to plead and prove the facts as therein alleged.

The lower Court justified its ruling on the theory that all the facts pleaded, and struck out, tended to contradict and vary the terms of a written agreement and hence were redundant and immaterial. To reach that conclusion, the Court, of course, assumed that all of the contract was fully agreed upon and integrated into the written agreement. That nothing was understood beyond the letter of that agreement, and that it fully and completely reflected the minds of the parties thereto.

THE CONTRACT. What was the contract between the parties? Was it deliberately reduced to writing by the parties? If so, is the "personal service agreement" that contract; or, was only a portion of the real agreement reduced to writing? Was that portion of the agreement providing for the commission, the consideration which induced plaintiff to sign the "personal service agreement?" Did the "personal service agreement" express the real consideration agreed on by the parties?

Plaintiff maintains that the foregoing mate-

rial questions are properly raised by the averments in his complaint; and that they cannot be answered from a mere inspection of the "personal service agreement."

"Even though there has been an integration, *i. e.*, a reduction of a transaction to a final and exclusive written memorial, yet, since several transactions may be consummated by the same parties at the same time of negotiation, and since the parties may integrate one of these transactions and not another or may integrate one part of a transaction and not another part, it is of course always open to show that the integration was partial only; and in such case the terms of the remainder, not covered by the written memorial, may be gleaned from anything said or done by the parties independently of the writing. Effect is given to the written memorial as exclusively representing the terms of the transaction, but only because the parties have so intended it, and therefore only so far the parties have intended it. Since all depends thus on the parties' intention as to the extent or scope of the integration, the application of the principle will depend almost entirely on the circumstances of each case, including the kind of transaction, the usual terms of such transactions, the scope of the writing, and the surrounding circumstances of the particular negotiation. No detailed rules can be formulated; and the working of the principle can best be understood by noticing its application in particular instances."

I Greenleaf on Evidence, 445 (16th Ed.).

As declared in *Liebke v. Methudy*, 14 Mo. App. 65:

"The courts have endeavored to adapt their rulings either way to the obvious demands of abstract justice in each particular case."

According to the foregoing rule, the lower

court erred in sustaining the company's motion to strike.

It is averred in the complaint that the company on receipt of plaintiff's itemized statement of the amount due him under the parol agreement, remitted to him a part of the amount due, claiming at the same time that the amount remitted was all that was due. That in conjunction with the plaintiff's conduct in fully performing the contract covering a period of sixteen months, during all of which period monthly reports, in accordance with the parol agreement, were forwarded to and received by the company, are strong circumstances going to establish the construction that was placed upon this agreement by the parties themselves.

"The constructions placed on the contract by the parties themselves ought to prevail."

Dist. of Columbia, etc., vs. Gallagher, 31 U. S. 526.

THE PERSONAL SERVICE AGREEMENT.

An examination of this writing, discloses the fact that it is not a complete contract embodying all the elements of the agreement.

1. The duties or services to be performed are not specified.

2. The places at which he is to perform the services are not specified.

3. It reads: "In consideration the first party will pay to the second party, etc." In consideration of what services and for what period?

4. When was this salary payable?

5. It states that first party will pay at the rate of \$125 per month and necessary traveling expenses while *away from Aberdeen, South Dakota*. What compensation was he to receive—what expenses was he to be allowed while performing services for the company at *his home in Aberdeen*?

6. It provides that the contract may be cancelled without liability by giving written notice. Plaintiff pleaded that in consideration of his remaining in plaintiff's employ until January 1st, 1910, he was to receive the bonus or commission sued for. That promise on his part alone was a sufficient consideration for the parol agreement.

7. It further provides that second party is to furnish a bond. For what purpose, upon what terms or conditions, this agreement does not state. Was the bond to include the faithful performance of the entire agreement, or only a portion of it?

8. What expense does the writing refer to, and what would be deemed proper "actual expenses"?

Therefore, "in the light of the contract's subject matter, the circumstances in which, and the purpose for which it was executed, which evidence is always admissible in the construction of written contracts, in order to put the court in the position of the parties," it is quite evident that this written agreement is not and was not intended to be the embodiment of the entire contract; and that plain-

tiff's claim for the extra compensation in commissions is not inconsistent therewith.

The part reduced to writing had reference, exclusively, to the fixed monthly wage; did not include, and was not intended to include the extra compensation to be earned, provided plaintiff did the extraordinary work so as to reach the standard fixed by the written schedule then delivered to him.

THE FACTS PLEADED AND STRUCK OUT,
DID NOT AND WERE NOT INTENDED
TO CONTRADICT THE PERSONAL
SERVICE AGREEMENT.

In the lower Court, the company's counsel contended that these tended to vary and contradict the writing in only two particulars:

(1) In changing the consideration named in the writing.

(2) In seeking extra compensation for services included in the writing.

The first refers to that part of the writing specifying \$125 per month.

The second refers to that part which includes all of plaintiff's time.

In the final analysis, it must be conceded that both of these parts of the contract go to the consideration. To know what was intended by each, one must first ascertain the true consideration for the contract.

In virtue of the facts pleaded, the case comes within the rule that the real consideration of a contract may be shown by parol evidence.

"Thus in *Philpot v. Gruninger*, 81 U. S. 14 Wall, 570, 577, it is stated that 'nothing is consideration that is not regarded as such by both parties.' To constitute a valid agreement there must be a meeting of minds upon every feature and element of such agreement, of which the consideration is one. The mere presence of some incident to a contract which might under certain circumstances be upheld as a consideration for a promise, does not necessarily make it the consideration for the promise in that contract. To give it that effect it must have been offered by one party and accepted by the other as one element of the contract. In *Kilpatrick v. Muirhead*, 16 Pa. 117, it was said that 'consideration, like every other part of a contract, must be the result of agreement; the parties must understand and be influenced to the particular action by something of value or convenience and inconvenience recognized by all of them as the moving cause. That which is a mere fortuitous result following accidentally from an arrangement, but in no degree prompting the actors to it, is not to be esteemed a legal consideration.' See also I Addison, Contracts, 15; *Ellis v. Clark*, 110 Mass. 389. Now, evidence of what took place at the meeting, if admissible for no other purpose, was competent as bearing upon the question whether the prepayment was mentioned or treated as an inducement or consideration for the release of the residue of the claim."

The Fire Insurance Association, Limited, v. John W. Wickham, Jr., 141 U. S. Supreme Court Reports, 564.

Plaintiff does not ask for a greater salary than \$125 per month for the services covered by

the writing. He does not attempt to ask for \$150 or \$200 per month for those services. By the written personal service contract, the company fixed a limit of its liability to plaintiff for his services as an ordinary collector, and for the services agreed on, but not included in the writing.

After thus fixing its liability, the company promised plaintiff that if he could during the year 1909 (Record, 25) collect at least \$2500 of desperate claims, and keep the total cost of his services, including the monthly salary of \$125 and all other costs and expenses down to the rate set out in the written schedule, he was to get the difference between that rate and the rate of his actual expenses to the company. Neither he nor the company could know what plaintiff's reward for his extraordinary services would be until January 1st, 1910. That was perfectly consistent with the written portion of the agreement. The safety and profitableness of the agreement, to the company, was verified in advance by its past experience.

In re Hurtman, 166 Fed. 776, it is held:

"Parol proof of facts leading up to the execution and delivery of a written contract, to show the considerations moving the parties thereto, is not a violation of the parol evidence rule."

Plaintiff does not deny that he was to devote his entire time to the company. His entire time was required in the fulfillment of the contract as agreed upon. Only a part of which agreement was included in the writing. "To devote his whole and

undivided time to the party of the first part during the continuance of this contract, and not to engage, or to be engaged, nor to be interested in other business during the existence of this contract," does not mean in consideration of \$125 per month, the company could demand all of plaintiff's time, days, nights, Sundays and holidays. That phrase in the writing must be interpreted by the court in the light of all the circumstances, the work to be done by plaintiff, the company's business, etc. And in the light of all the circumstances, it is quite evident that the real and only intent of that phrase was to obligate plaintiff to be under obligations to one master, the company; that he should not disqualify himself by being in any way engaged, or interested in any other business. It was not intended to include *all his time*, but to *exclude* his engagements or connections with any other concern. And hence the parol portion of the agreement in question does not contradict, neither is it inconsistent with that phrase in the writing.

In construing this writing, it seems to plaintiff's counsel, the court must presume that, at the time the writing was signed, it was agreed and understood what services plaintiff was to render the company. But the writing is silent on the subject. And being silent, it is legal and proper to show by parol what the services were to be.

We have pleaded what services were to be rendered for the \$125 per month, and what were to

be rendered for the commission or bonus.

The facts pleaded were pertinent and material on the theory that the writing included only a part of the agreement; or, that the part not included in the writing, was a collateral agreement constituting the real consideration for the execution of the writing. And on either theory plaintiff is entitled to recover.

In arriving at what services were to be rendered for the \$125, the written schedule, delivered to plaintiff at the time, is a part of the one transaction and should be considered by the Court.

In *Thomson v. Beal*, 48 Fed. 614 (U. S. Circuit Court, Mass., Colt, J.), suit was brought to recover interest on a certificate of deposit on the verbal promise of the cashier to pay interest. In deciding the question the court observed:

"The general legal proposition advanced by the defendant in support of the demurrer, that parol evidence cannot be introduced to contradict or vary the terms of a written agreement, is well settled, and requires no citation of authority.

But the question here presented is whether the certificate of deposit, which does not in express terms mention any interest, is to be considered as alone representing the entire contract in writing, or whether such certificate should not be taken in connection with the written memorandum made at the time on the stub of the bank's book from which the certificate was taken. In taking both writings together as constituting one contract, we are not seeking to add or to vary the terms of a written contract by parol evidence, but we are simply seeking to discover what the contract actually was, as

exhibited in writing made at the time. I understand the rule to be that all contemporaneous writings relating to the same subject-matter, while the controversy exists between the original parties or their representatives, are admissible as evidence, and that extrinsic evidence is admissible to show ment of the parties. *Payson v. Lamson*, 134 Mass. 593; *Hunt v. Livermore*, 5 Pick. 395. The defendant argues that the writing on the stub was a mere private memorandum made by the cashier for his own convenience. There is no allegation in the bill to this effect. The bill alleges that, at the time the which paper expresses the real intention and agree-certificate was given, 'Said cashier made a memorandum thereof by making, or causing to be made, the figures 2½ per cent on the stub or margin of the book from which said certificate was taken.' In a certain sense, the stub and the certificate cut from it may be said to constitute but one writing; at all events, in my opinion, both may be consulted in order to ascertain what was the real contract between the parties. Demurrer overruled."

WHERE ONLY ONE PART OF AN AGREEMENT HAS BEEN REDUCED TO WRITING, PAROL EVIDENCE MAY BE RECEIVED TO ESTABLISH THE PORTION NOT INCLUDED THEREIN.

"Where a written contract was made in pursuance of a prior verbal contract between the parties broader in its scope, and as a means of carrying out a portion only of such verbal contract, the rule that a verbal agreement is conclusively presumed to be merged in a subsequent written contract does not apply, and the verbal agreement may be shown in a suit to determine the respective rights of the parties."

National Wire Bound Box Co. et al. vs. Healy, 189 Fed. 49, 110 C. C. A. 613.

One of the latest cases in support of the rule contended for by the plaintiff here is *Harman vs. Harman*, 70 Fed. 894; 17 C. C. A. 479. In that case two nephews leased certain land from their uncle. The lease was in writing and contained almost every imaginable condition, and among others it provided that the lessor reserved the right to cancel and terminate the contract at the end of any season, provided he sold the premises; it further provided that the lease would be terminated upon the death of either party to the contract.

Notwithstanding this written lease and these positive provisions, the court permitted the nephews to plead and establish by parol testimony that there was a verbal contract and agreement in addition to the written lease under and by virtue of which they took possession of the land and occupied it. And that under the provisions and conditions of the oral contract, they were to remain in possession of the farm, cultivate, care for, pay the rent as provided in the written lease, until the death of their uncle, at which time the premises were to become theirs.

In the recent case of *Haas Bros. v. Hainburg-Bremen Fire Insurance Co.*, 181 Fed., 916, this court had occasion to note the many exceptions to the parol evidence rule. And therein adopted the following rule:

“Where a written instrument, executed pursuant to a prior verbal agreement or negotiation, does not express the entire agreement or under-

standing of the parties, the parol evidence rule does not apply to prevent the introduction of extrinsic evidence with reference to the matters not provided for in the writing."

In that case, plaintiff was permitted to plead a parol agreement which was the real consideration for signing the written release.

"Nor does the rule apply in cases where the original contract was verbal and entire, and a part only of it was reduced to writing. Thus, where, upon an adjustment of accounts, the debtor conveyed certain real estate to the creditor at an assumed value, which was greater than the amount due, and took the creditor's promissory note for the balance; it being verbally agreed that the real estate should be sold, and the proceeds accounted for by the grantee, and that the deficiency, if any, below the estimated value, should be made good by the grantor; which agreement the grantor afterwards acknowledged in writing—it was held, in an action brought by the latter to recover the contents of the note, that the whole agreement was admissible in evidence on the part of the defendant; and that, upon the proof that the sale of the land produced less than the estimated value, the deficiency should be deducted from the amount due upon the note."

I Greenleaf, Sec. 284 (16th Ed.).

"Certainly the general rule which excludes evidence of parol negotiations and undertakings, when offered to contradict or substantially vary the legal import of a written agreement, is not to be questioned or disturbed. In this state it has been thought to be so well settled in reason, policy and authority, as not to be a proper subject of discussion. It has full application, however, within very narrow limits. In the first place it applies only in controversies between parties to the instru-

ment (*New Berlin v. Norwich*, 10 Johns. 229), and between them is subject to exceptions, upon allegations of fraud, mistake, surprise, or part performance of the verbal agreement. Nor does it deny the party in whose favor that agreement was made, the right of proving its existence by way of defense in an action upon the written instrument under circumstances which would make the use of it for any purpose inconsistent with that agreement, dishonest, or fraudulent. *Martin v. Pyerft*, 2 DeG., M. & G. 785, 795; *Jervis v. Ber-ridge*, L. R., 8 Ch. App. 351."

Julliard v. Chaffee, 92 N. Y. 531.

"So, to show that at the time of entering into a contract of service in a particular employment, there was a further agreement to pay a sum of money as a premium, for teaching the party the trade, whereby an apprenticeship was intended; and that the whole was therefore void for want of a stamp, and so no settlement was gained."

I Greenleaf on Ev., Sec. 285 (16th Ed.).

IF A CONTEMPORANEOUS PAROL AGREEMENT WAS THE CONSIDERATION OR INDUCEMENT FOR ENTERING INTO A WRITTEN AGREEMENT, THE PAROL AGREEMENT MAY BE SHOWN.

In plaintiff's Complaint, it is averred that the verbal agreement to pay the commission or bonus was the real consideration for signing the writing and entering the company's employ. And as a legal consequence the writing does not preclude a recovery on the verbal agreement.

Keller v. Cohen, 217 Pa. 522.

The court's attention is called to the case of

DePue v. Mackintosh, 127 N. W. 532, decided by the Supreme Court of South Dakota in July, 1910. That case involved a written contract entered into by the parties therein, all agreeing to bore a "flowing well" on land specified. The contract appears to be a complete contract in every particular.

The action was brought to recover the contract price, Five Hundred Dollars. The defendant answering alleged that the well was not drilled and completed as alleged and agreed upon by reason of which it was of no value whatever.

Then the defendant offered to file an Amended Answer setting out a verbal agreement that was made at the time of the signing of the written contract and which was the inducement for plaintiff's signing the written contract. It is alleged that in the verbal contract, the party knew that the well was intended to supply water for an extensive stock farm and that he agreed to drill the well and obtain a sufficient flow of water to supply all stock that might be placed on the farm, and by reason of his agreeing to do that the other party signed the written contract.

In passing upon that feature of the case, the court states:

"It is contended by the respondent that under the provisions of section 1239 of the Civil Code which provides, 'The execution of a contract in writing, whether the law required it to be written or not, supersedes all the oral negotiations or stipulations concerning its matter, which preceded or accompanied the execution of the instrument,' the

facts set out in the amended answer were inadmissible on the ground that they would vary or contradict the terms of a written contract. This provision of our code embodies the common-law rule upon the subject of written contracts, and while 'the execution of a contract in writing, whether the law requires it to be written or not supersedes all of the oral negotiations or stipulations concerning its matter, which preceded or accompanied the execution of the instrument,' 'nevertheless, as contended by the appellant, there are exceptions to the rule. And one of the exceptions seems to be that agreements or representations made prior to the written contract under which the party was induced to sign the contract may be shown; in other words, where the parol contemporaneous agreement was the inducing and moving cause of the written contract, or where the parol agreement forms part of the consideration for a written contract, and where he executed the written contract upon the faith of the parol contract or representations, such evidence is admissible.' *Chapin v. Dobson*, 78 N. Y. 74, 34 Am. Rep. 512; *Thomas v. Loose*, 114 Pa. 35, 6 Atl. 326; *Dicken v. Morgan*, 54 Iowa, 684, 7 N. W. 145; *Cullmans v. Lindsay*, 114 Pa. 166, 6 Atl. 332; *Barnett v. Pratt*, 37 Neb. 352, 55 N. W. 1050; *Ayer v. R. W. Bell Mfg. Co.*, 147 Mass. 46, 16 N. E. 754; *Davis v. Cochran*, 71 Iowa, 369, 32 N. W. 445; 9 Ency. Evid. 350; *Ferguson v. Rafferty*, 128 Pa. 337, 18 Atl. 484, 6 L. R. A. 33; *Hines v. Willcox*, 96 Tenn. 148, 33 S. W. 914, 34 L. R. A. 824, 832, 54 Am. St. Rep. 823; *Walker v. France*, 112 Pa. 203, 5 Atl. 208. In *Walker v. France*, *supra*, the Supreme Court of Pennsylvania, in discussing this subject, says: 'That a written agreement may be modified, explained, reformed or altogether set aside by parol evidence of an oral promise or undertaking material to the subject-matter of the contract made by one of the parties at the time of the execution of the writing, and which induced the other party to

put his name to it, must now be regarded as a principle of law so well settled as to preclude discussion.'

In *Chapin v. Dobson*, *supra*, the Court of Appeals of New York held: 'The rule prohibiting the reception of parol evidence to vary or modify a written instrument does not apply where the original contract was verbal and entire, and a part only was reduced to writing.' Such, in fact was the case at bar, as appears by the allegations of the amended answer. That portion of the plaintiff's agreement to drill a well that would provide a sufficient flow of water to supply plaintiff's stock, and which was the inducing cause of the contract, was omitted therefrom."

In the case of *American Building and Loan Association v. Ole Dahl, et al*, (Minn.) 56 N. W. 47, defendants, Fagan and Cleveland were sued as sureties of defendant Dahl on a certain building bond, in and by which they undertook, upon the *consideration recited*, that the defendant, Dahl, would pay and *discharge all claims* for labor and material furnished in the construction of certain buildings. In their answer, the sureties alleged that at the time of the execution of the bond, it was mutually agreed by all parties thereto that the claim sued on was to be paid by the plaintiff and that such promise on its part was part of the consideration that induced the sureties to sign the bond. The court sustained the defense on the ground that the verbal agreement went to the execution of the bond, and the consideration therefor.

IF THE COMPANY PROCURED THE WRITTEN AGREEMENT ON ITS PROMISE TO CARRY OUT THE PAROL AGREEMENT, IT WOULD BE THE AUTHORIZATION OF A FRAUD TO PERMIT IT TO NOW REPUDIATE THE LATTER AFTER BOTH CONTRACTS HAVE BEEN EXECUTED.

“Nor is it essential to the admission of parol evidence that a fraud was originally intended. It is enough that, though the parties acted in mutual good faith at the inception of the transaction, an attempt is made to wrest the instrument to a purpose not contemplated or use it in violation of the accompanying agreement. It is as much a fraud to obtain a paper for one purpose and use it for a different and unfair purpose as to practice falsehood or deceit in its procurement. The primary honesty of purpose but adds to the moral turpitude of the subsequent effort to escape from it; or when moral guilt can be imputed as perhaps in our case, a legal delinquency attaches upon an attempted abuse of the writing sufficient to subject it to the influence of the oral evidence.”

Rearich v. Swinhart, 11 Penn. State, 233,
51 American Decisions, 544.

“It may be conceded that no fraud was practiced upon the appellant by the appellee when he received the note, and that at that time he honestly intended to keep his promise as to how it should be paid; but however honest and upright his intention may then have been, if, to procure an unfair advantage to himself, he now attempt to exact payment from the appellant in violation of his promise, without which the note would not have been given, he is guilty of a fraud against which the appellant may defend; and the latter is not defending on the ground that the plaintiff had agreed that he

would not use the note as a note, but that he is attempting to use it differently from the use which he promised he would make of it."

Gandy v. Weckerly, 220 Pa. 285, 69 Atl. 858.

"In such a case the independent oral agreement must have been upon some collateral matter, and must have operated as an inducement to the complaining party to enter into the agreement, whereas in the absence of it he would not have done so. To deny the admission of evidence in such a case, if relevant to the issues made by the pleadings, would be to allow one of the parties to induce another to enter into the engagement under false representations, and to aid him to enforce it against his adversary notwithstanding the fraud practiced upon him, by holding out to him the fraudulent inducement. We recognize this principle, and believe it to be in full accord not only with the spirit of the statute, but also with adjudged cases: *Thomas v. Scutt*, 127 N. Y. 133, 27 N. E. 961; *Naumberg v. Young*, 44 N. J. L. 331, 43 Am. Rep. 380; *Hei v. Heller*, 53 Wis. 415, 10 N. W. 620; *Specht v. Howard*, 16 Wall 564; *Forsythe v. Kimbell*, 91 U. S. 291; *Seitz v. Bremers' Refrigerating Machine Co.*, 141 U. S. 510, 12 Sup. Ct. Rep. 46; *Van Winkle v. Crowell*, 146 U. S. 42, 13 Sup. Ct. Rep. 18; *Cliver v. Heil*, 95 Wis. 364, 70 N. W. 346; *Flynn v. Bourneuf*, 143 Mass. 277, 58 Am. Rep. 135, 9 N. E. 650; *Eighmie v. Taylor*, 98 N. Y. 288; *Beall v. Fischer*, 95 Cal. 568, 30 Pac. 773; *Bardford Investment Co. v. Joost*, 117 Cal. 204, 48 Pac. 1083."

Armington v. Stelle, 27 Mont. 13, 69 Pac. 115.

"It is as much a fraud to obtain a paper for one purpose and use it for a different and unfair purpose, as to obtain it by fraudulent statements."

Murray v. Dake, 46 Cal. 644.

In *Young v. Stamfler*, 27 Wash. 350, 67 Pac. 721, the defendant was induced to execute a warranty deed in lieu of a quitclaim deed, upon the representation of the husband of the grantee that such a deed would better enable them to dispose of the property and that the warranty clause would not be enforced.

In admitting testimony to establish the parol agreement the court observed:

"The evidence to support the affirmative defense of the defendants was not introduced to control or vary the covenant in deed, but to prevent the enforcement of the same, because it was obtained in such a manner that it would be a fraud upon the covenantors to allow the enforcement of the covenants."

And in the very recent case of *Naden v. Christopher*, 62 Wash. 413 (1911), the same rule was followed where a clause in a warranty deed gave the grantee the right to collect all rents due under a certain lease, it was decided that parol evidence was admissible, as between the original parties, to show that it was inserted on the express stipulation that it should not be treated as a warranty; not to vary the terms of the deed, but to prevent its fraudulent use.

THE PAROL AGREEMENT WAS COLLATERAL TO THE WRITTEN AGREEMENT.

From plaintiff's complaint, it is clear that plaintiff and the company had two main objects in view. First, the company desired plaintiff's services. Second, plaintiff was anxious to procure

as remunerative a compensation as possible. He was also willing to earn every dollar of it. They did not agree on a certain fixed compensation. And it was finally left dependent upon the contingency of his attaining certain results. The amount the company would be liable for in any event was agreed to at the rate of \$125 per month. That part was reduced to writing and signed. According to the company's custom, it would not include the bonus or commission part in the salary contract, but as the real inducement for plaintiff's signing, it positively agreed to pay the bonus or commission, and after the contract was entirely executed did pay a small part of it. According to the arrangement, plaintiff earned during 1909 on the salary part of the agreement \$1,500—on the bonus or commission \$2,172.78. Hence, the naked figures stand for more than words, and show the written part of the agreement was a mere incident to the entire arrangement.

The commission part of the agreement was collateral. It depended upon his employment. In arriving at the amount of commission due, the fixed monthly rate and expenses had to be figured on, and at the end of the calendar year, deducted from the total amount allowed by the schedule. By the arrangement, the company knew in advance the maximum amount it would be liable to plaintiff for in any event. And by the arrangement, a great inducement was held out to plaintiff whereby the company would derive the greatest possible result

from his efforts at the lowest possible expense. And when the entire transaction is justly analyzed in the light of all the circumstances, it does appear that both the written and parol parts of the agreement are consistent, and each is based on an independent essential part of the entire arrangement.

In *Reimer v. Rice*, 88 Wis. 16, 59 N. W. 450, the defendant gave to plaintiff a written option to purchase certain real property upon terms fully stated therein. Thereafter plaintiff brought suit alleging that he had an oral agreement with the defendant by which he was authorized to find a purchaser for the property and to receive as his commission for such services, the excess of the price thus obtained over and above the price which was named in the written option, and recovered on the theory that the parol agreement was collateral to the written agreement.

The case just cited was followed by the Supreme Court of Iowa in *Wells v. Hocking Valley Coal Co.*, 114 N. W. 1076.

"The principle that oral evidence cannot be received to vary, alter, or contradict the terms of a written contract is so elementary and well settled that it scarcely requires statement. It is a salutary rule, and one we believe that has been consistently adhered to by this court. But the rule itself suggests its limitations. It is the evidence which tends to establish an inconsistent obligation from that which is expressed in the writing which is rejected. Where, therefore, it is shown that there was an original verbal contract, and a part of it only has been reduced to writing, the rule does not apply as to the part not reduced to writing.

So if the oral and written contracts are distinct and separate undertakings, though perhaps relating to the same property, the fact that one is in writing does not prevent the proof of the other by parol if it be not inconsistent with the writing.' Along the line of the authorities hereinbefore cited by us, the court proceeds to say further: 'If, therefore, we regard the written option as a valid contract which authorized the agent himself to become the purchaser, it is a separate collateral contract which may consistently exist at the same time as the oral contract for the sale of the property to others on commission, and hence does not supersede or vacate it.'

In *Heines v. Willcox*, 96 Tenn. 148, the plaintiff occupied defendant's house under a written lease. She sued to recover damages for personal injuries sustained by falling through a defective porch. Under the terms of the lease she was to keep the premises in good condition. So she based her suit on a contemporaneous agreement on defendant's part to repair the house. The lower court refused to consider the parol testimony, in reversing the judgment, the Supreme Court decided:

"The question as to whether the entire contract was reduced to writing, or an independent collateral agreement was made, was a question of fact, and where there was any evidence to sustain the contention, it was a matter for the jury to determine, and not for the court: *Cobb v. Wallace*, 5 Cold. 540, 98 Am. Dec. 435; *Stewart v. Phoenix Ins. Co.*, 9 Lea. 104, 112. We think it was therefore, error in the trial judge to determine these questions and exclude all evidence in regard to them."

The real question to be first decided in this case, is: Was there a parol agreement to pay this bonus or commission? According to the averments of the complaint, plaintiff is entitled to have that issue submitted to the jury.

Therefore, we believe plaintiff is fully entitled to recover the amount sued for, and that the lower court erred in sustaining the company's motion to strike, from the complaint, the portions included therein. And again erred in sustaining the demurrer and entering judgment against plaintiff.

SECOND CAUSE OF ACTION.

The second cause of action is based upon the written contract entered into by plaintiff and defendant company for personal services to be rendered in the state of Oregon. (See Contract, Transcript of Record, 35-36.) In that contract the following provision appears: "Either party may terminate this agreement by giving thirty days' notice to the other party. The first party may terminate the agreement at any time for neglect of duty, refusal to follow instructions, or should it consider second party's work unprofitable or undesirable, in which event compensation shall cease the day and date the agreement is terminated."

At pages 30 and 31, Transcript of Record, plaintiff avers in his complaint that the relation between him and defendant company was identically the same on July 24, 1911, when he was discharged, that it was at all times from and after November 15, 1910, when the contract was made; that he received no notice whatever of defendant's

intention to terminate the contract; that he was arbitrarily, capriciously, and without cause, discharged from defendant's employ; plaintiff further alleges that he did not neglect his duty to defendant, he did not refuse to follow instructions, and that his work and services were profitable and desirable to defendant company, and that it had no reason or cause whatever for discharging him without giving the thirty days' notice as provided by the contract. He further alleges that it was impossible for him to procure any other employment for more than thirty days after his discharge, and he seeks to recover \$125, being the salary due for the month succeeding his discharge.

Plaintiff's contention is that under the terms of this contract, he is entitled to recover one month's salary on account of his being discharged without receiving the thirty days' notice. The contract in words so provides: "Either party may terminate this agreement by giving thirty days' notice to the other party."

It is contended by the defendant company that by the terms of the sentence, in the contract, following the above quotation, it had the right to arbitrarily, and without assigning any cause whatever, discharge plaintiff. If this construction be true, then the provision in the contract, requiring thirty days' notice becomes a nullity. When a contract is susceptible of two constructions, one that nullifies, the other that gives effect, the latter is always adopted.

Both these provisions of the contract should be read and considered together, in the light of the circumstances in which the contract was made and in consideration of all the other provisions in the contract, and when so weighed, the two provisions do not appear so inconsistent. The first provision states when either party may terminate the contract. The second provision specifically, and in words sets out that the company may terminate the contract if the plaintiff neglects his duties, refuses to follow instructions or should the company consider his work unprofitable or undesirable. It did not lodge with the company the absolute right to arbitrarily, or capriciously be the sole judge and arbiter of the existence of these conditions. This question was fully discussed and analyzed in *Parlin, etc. v. City of Greenville*, 127 Fed. 55 (5th Circuit), and in that opinion we find the following which seems to be exactly applicable to the question at bar.

“In *Rawlins v. Honolulu Co.*, 9 Hawaiian, 262, the plaintiff agreed to work in a skillful and proper manner to the satisfaction of the defendant. Construing the contract, the court said that the defendant was bound to be satisfied if the work was done in a skillful and proper manner. The court observed that the fact that one is the sole judge does not authorize him to act whimsically or in bad faith.”

Other authorities are also collated in that opinion, which sustain plaintiff's right to recover.

In the case of *Beissel v. Vermillion Farmers*

Elevator Co. (Minn), 113 N. W. 575, the contract had this provision:

“. . . That should the said party of the second part fail, neglect, or refuse to keep and perform any and all of the covenants herein set forth, and fail and neglect or refuse to perform said services in a manner satisfactory to the said party of the first part, . . . then and in that event the said party of the first part may, at its option, declare this agreement null and void, and the said party of the first part shall be absolutely and forever discharged from any and all liability under the conditions of this agreement.”

and the court approved the following instruction:

“Now, this contract provides that the plaintiff might be discharged if he did not perform the services that he was engaged to perform to the satisfaction of the company. Did he perform the services to the satisfaction of the company? If they were dissatisfied with the manner in which he performed his services, was there a reasonable cause for that dissatisfaction? If so, they had the right to discharge him. Under this contract they could not act arbitrarily. They were not permitted to do that, or whimsically. If they had reasonable ground, or there was a reasonable cause for their dissatisfaction and they were dissatisfied, then they had the right to discharge him. . . .”

Practically this same question was involved in *Smith v. Robson* (N. Y.), 42 N. E. 677. The contract in that case had the following provision:

“The said J. R. Smith (plaintiff) further agrees that if at any time Stuart Robson (defendant) shall feel satisfied that he is incompetent to perform the duties which he has contracted to perform in good faith, or is inattentive to business, careless in the rendering of characters, or guilty of any violation of the rules made by Stuart Rob-

son, then he may annul this contract by giving two weeks' notice to said J. R. Smith."

Answering defendant's contention that he had the absolute authority to discharge the plaintiff, the court stated:

"The claim that the defendant reserved an arbitrary power to discharge the plaintiff is inconsistent with the presence of any limiting words in the contract. Construing the contract as claimed in behalf of the defendant, it is a contract terminable at the will of the defendant, but binding on the plaintiff for the period designated. If this had been intended, the clause is almost wholly superfluous. In that view, it was quite unnecessary to introduce any words of condition, or any reference to the conduct of the plaintiff. It was, doubtless, intended to give the defendant a wide discretion. The grounds which might exist for reasonable dissatisfaction on the part of the defendant could not readily be formulated in advance, so as to cover all the contingencies. It was reasonable that the defendant should be in a position, if in good faith he felt that the plaintiff did not come up to the requirements of the situation, to discharge him. If the defendant had shown to the satisfaction of the jury, acting in good faith, he had discharged the plaintiff because he was dissatisfied, and that his action was not arbitrary and capricious he could not have been held liable. But the question whether the defendant acted in good faith was by the contract a material question, and the motion for nonsuit, based on a construction of the contract which eliminated this element, was properly overruled."

Therefore, plaintiff is entitled to recover on his Second Cause of Action, and by reason thereof, the lower court erred in sustaining the general demurrer to his Complaint. Hence it would seem

that both law and justice demand the reversal of this judgment, and that plaintiff be permitted to proceed with the trial.

Respectfully submitted,

S. A. KEENAN,

Attorney for Plaintiff in Error.

In The
United States Circuit Court of
Appeals for the Ninth Circuit.

J. A. CRESSEY,

Plaintiff in Error,

vs.

INTERNATIONAL HARVESTER COM-
PANY OF AMERICA, a corporation,
Defendant in Error.

IN ERROR TO THE DISTRICT COURT OF
THE UNITED STATES FOR THE
DISTRICT OF OREGON.

BRIEF FOR PLAINTIFF IN ERROR.

S. A. KEENAN,
Attorney for Plaintiff in Error.
Empire Building, Seattle, Washington

**United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT**

J. A. Cressey,
Plaintiff in Error,
v.

International Harvester Company of America, a
corporation,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

On writ of error to the United States District
Court for the District of Oregon.

ADDITIONAL STATEMENT OF CASE.

This cause was commenced in the Circuit Court of the State of Oregon for Lane County and thereafter removed to the United States District Court for the District of Oregon.

Thereafter and on the 15th day of December, 1911, plaintiff filed his amended complaint (Transcript, page 1), and thereafter and on the 15th day of December, 1911, defendant filed its answer to plaintiff's amended complaint (Transcript, page 7). No reply having been filed to the answer of the de-

fendant, on the 23d day of January, 1912, defendant filed its motion for judgment on the pleadings (Transcript, page 16); thereafter and on the 29th day of February, 1912, defendant's motion for judgment on the pleadings was sustained by the court (Transcript, page 17), and on the 29th day of February, 1912, judgment was given in favor of the defendant and against the plaintiff pursuant to the motion therefor (Transcript, page 18); thereafter and on April 22, 1912, the judgment was set aside and plaintiff permitted to file his second amended complaint (Transcript, page 19), and thereafter defendant in error filed a motion to strike out portions of plaintiff's second amended complaint, which motion was allowed, and thereafter a demurrer was filed to the second amended complaint (Transcript, page 44), and thereafter said demurrer was sustained by the court (Transcript, page 45), and the plaintiff having failed to plead further final judgment was given in favor of the defendant in error (Transcript, page 47).

POINTS AND AUTHORITIES.

I.

Judgment may be given on the pleadings. Section 79, Lord's Oregon Laws, provided as follows:

"If the answer contains a statement of new matter constituting a defense or counter claim, and plaintiff fails to reply or demur thereto within the time prescribed by law, defendant may move the court for such judgment as he is entitled to on the pleadings. * * * At any time when the pleadings in a suit or action are completed or either

party fails or declines to plead further, the court may, upon motion, grant to any party moving therefor, such judgment or decree as may appear to the court the moving party is entitled to upon the pleadings."

Wallace v. Baisley, 22 Ore. 573; 30 Pac. 472.

II.

The law is well settled that extrinsic evidence cannot be admitted to add to, contradict, subtract from or vary the terms of a written contract. The law conclusively presumes that all verbal conversations and negotiations had by the parties prior to and at the time of the consummation of the contract are included therein.

Wilson v. Deen, 74 N. Y. 531.

Looney v. Rankin, 15 Ore. 617; 16 Pac. 660.

Jungerman v. Bovee, 19 Cal. 354.

Stoddard v. Nelson, 21 Pac. 456.

Luitweiler Pumping Engine Co. v. Ukiah
Water & Imp. Co., 116 Pac. 707.

Arnold v. Fraser, 117 Pac. 1064.

Atchison, T. & S. F. Ry. Co. v. Van Ord-
strand, 73 Pac. 113.

Sutherlin v. Bloomer, 93 Pac. 135.

Ruckman v. Lumber Company, 70 Pac. 881.

Edgar v. Golden, 48 Pac. 1118.

Hindman v. Edgar, 17 Pac. 862.

Tyson v. Neil, 70 Pac. 791.

Williams v. Mt. Hood Ry. & Power Co., 110
Pac. 490.

Northern Assurance Co. v. Grand View
Building Association, 183 U. S. 308.

Potomac S. B. Co. v. Upper Potomac S. B.
Co., 109 U. S. 672.

Emerson v. Slater, 22 How. 28.

Olricks v. Ford, 23 How. 49.

Dewitt v. Berry, 134 U. S. 306.

Seitz v. Brewers Refrigerator Machine Co.,
141 U. S. 510.

Bast v. First National Bank, 101 U. S. 93.

Blevin v. New England School Co., 23 How.
420.

Baker v. Nachtriat, 19 How. 126.

The case of Looney v. Rankin, *supra*, was an action similar to the one at bar. In that action the plaintiff, Looney, signed an agreement containing the following clause:

“And I further agree to render to M. B. Rankin my full time and the time of my son Roberts at any labor he may direct for the term of twelve months from the 9th day of this month.”

In that action plaintiff attempted to show that he was to receive additional consideration from that mentioned in the writing. In discussing the matter the court uses the following language:

“The fact that parol evidence can not be used for the purpose of contradicting, adding to, sub-

tracting from or varying the terms of a written contract, or to control its legal operations or effect, except to impeach it for fraud or reform it for accident or mistake is too well settled to require citations of authorities to support it. Another equally well settled principle kindred to the one above stated is that all oral negotiations or stipulations between the parties preceding or accompanying the execution of a written instrument are regarded as merged in it. The reason of the rule is explained by judges and text writers, and is that parties making a written memorial of their transaction have implicitly agreed that, in event of any misunderstanding, that writing should be referred to as proof of their act and intention; that such applications as arose from the paper, by just construction or legal intendment, should be valid and compulsory on them, but that they would not subject themselves to any stipulations beyond their contract, because if they meant to be bound by any such they could have added them to their contract and thus have given them a clearness, a force and a directness which they would not have by being trusted to the memory of a witness. And where a written contract appears on its face to be complete, the rule here referred to, so far as it extends, is inflexible."

In the same case the court also uses the following language:

"Upon the face of the writing it appears inferentially at least that the labor so to be rendered was intended as a further consideration for the cancellation of the debt, and proof of the parol agreement whereby Rankin was to pay \$600 therefor contradicted the terms of the writing, and the proof

was not admissible, and the Circuit Court committed an error in admitting it. 'The rule that parol evidence cannot be admitted for such purpose is a wholesome and righteous one and should not be relaxed.'"

In the case at bar the contract entered into between the parties in 1908 provided for a salary of \$125 per month. Plaintiff alleges that his contract made in 1909 (Transcript, page 33) was entered into only in accordance with defendant's custom and practice in having its collection agents sign its said printed contract annually in July or August. The contract entered into in August, 1909, provided for a salary of \$137.50 per month instead of \$125 per month provided for in the preceding contract, and this contract therefore was not made as a matter of "custom," as plaintiff alleges, but for the purpose of providing an increase in plaintiff's salary.

Counsel for plaintiff in error cites in his brief several Pennsylvania cases on the question of parol and written contracts. Pennsylvania decisions on this question are not in harmony with the great weight of authority, and it is stated in Note 487 Cow. & H. to 2, Phil. Ev. 650, that "Pennsylvania cases on the subject of the rule of evidence in respect to written instruments are not always safe guides when inquiry is merely as to the rule of law."

In the case of *Bast v. Bank*, 101 U. S. 93, the Supreme Court of the United States says:

"It is not always easy to determine when in Pennsylvania parol evidence is admissible to explain a written instrument, but in *Ansbach v. Bast*, 53 Pa. St. 356, it is expressly declared that 'no case

goes the length of ruling that such evidence is admitted to change the terms itself without proof or even allegations of fraud or mistake.' ”

In the case of *Stoddard v. Nelson*, 21 Pac. 456, the Supreme Court of the State of Oregon says:

“The rule of law is too well settled to admit of controversy that extrinsic evidence is not admissible to either contradict, add to, subtract from or vary the terms of a written contract.”

The court further states as follows:

“It is not possible, without doing violence to principles as old and firmly fixed as the common law itself, to escape the force and effect of these authorities. It is true their application in this particular case may work hardship on the plaintiff, but he was familiar with the law and could have readily protected himself by ingrafting a stipulation into the written lease.”

In the case at bar Cressey signed two written instruments, both of which provided that he should devote his whole and undivided time to the business of the company and perform such duties and at such places as it might from time to time direct, and no mention is made in either contract concerning a “bonus” or “commission.” The parties had every opportunity to include any agreements for commissions in their written contract, and to hold now that Cressey could prove a verbal contract to the effect that he was not to devote his whole time and attention to the service of the company in consideration of a salary of \$125 per month (later \$137.50) would be to open the door for fraud and perjury, and would also destroy the safety that exists when parties have reduced their agreements to

writing, and make such agreements of no more effect than verbal conversations. Plaintiff in error is a man versed in business affairs, and is, he states, very competent. There is no reason why the alleged verbal contract which he pleads should not have been incorporated into some of the written instruments executed by the parties.

The stability and safety of business transactions demand that written instruments should not be set aside at the will of a contracting party except for fraud or mistake. By reducing their agreement to writing the parties have agreed that the written instrument shall be referred to by them for proof as to the terms of their stipulations.

This is not a suit to correct a mistake nor to reform a written instrument. Plaintiff in error does not allege nor claim any mistake in the written contract, nor does he seek to reform the same; neither does he claim nor allege any fraud. He is seeking to enforce an alleged parol agreement whose terms are contradicted by the written instrument.

Further comment on the decision of the Supreme Court of Pennsylvania on the question of parol evidence where written documents are attacked is made by the Kansas Supreme Court in the case of *Atchison, T. & S. F. Ry. Co. v. Ordstrand*, 73 Pac. 113. The following language is used:

“But the rule excluding parol evidence to vary written contracts has never obtained in that state.
* * * Therefore the decision quoted from can not be followed.”

The Kansas court further states:

“That if the alleged verbal promise existed at all it existed as part of the negotiation which was finally concluded by writing of a different purport, which writing was willingly executed with full opportunity and knowledge, and therefore with full knowledge of its conditions.”

The court further states:

“The plaintiff’s pleadings and the findings of the jury therefore presented a simple case of an attempt to supplement a written contract by parol evidence so as to extend its terms to cover a matter which the instrument itself excluded.”

In the case of *Smith v. Caro & Baum*, 9 Ore. 282, the Supreme Court uses the following language:

“This rule of evidence which inhibits proof of a contemporaneous parol agreement to vary or contradict a written instrument, is conceded to be of the utmost importance in the administration of justice. It is founded upon the principle that all previous and contemporaneous negotiation and discussion upon the subject are merged in and extinguished by the writing and cannot be shown to vary or contradict it; the mischief which would result from a lax application of the rule are too many and manifest to require illustration. That conditions in written instruments may be waived by subsequent oral agreements without violating this principle of evidence is not questioned, but not by prior or contemporaneous verbal agreements.”

III.

The alleged agreement is within the statute of frauds.

Plaintiff contends that the alleged agreement was entered into in July, 1908, and was, he states, to be performed between January 1, 1909, and January 1, 1910; it was therefore an agreement not to be performed within a year and void under the statute of frauds because not in writing.

Recovery for services rendered under a contract not enforceable because within the statute of frauds can only be had upon a quantum meruit.

Am. & Eng. Ency. of Law (2d ed.), Vol. 29,
page 839.

Albee v. Albee, 3 Ore. 321.

Wallace v. Long, 105 Ind. 522.

Williams v. Bemis, 108 Mass. 91.

Koch v. Williams, 82 Wis. 186.

Cohen v. Stein, 61 Wis. 508.

Lapham v. Osborne, 20 Nev. 168.

King v. Benson, 22 Mont. 256.

Stevens v. Lee, 70 Texas, 279.

Sims v. McEwen, 29 Ala. 184.

Patten v. Hicks, 43 Cal. 509.

Hillhouse v. Jennings, 60 S. C. 373; 38 S. E.
599.

Gazzam v. Simpson, 114 Fed. 71.

IV.

The consideration of a written contract cannot be impeached by an alleged prior or contemporaneous parol agreement.

A party has the right to make the consideration of his agreement the essence of the contract, and when this is done the consideration for the contract with reference to its conclusiveness must stand upon the same footing as its other provisions, and accordingly cannot be affected by the introduction of parol or extrinsic evidence.

17 Cyc. 661.

Hilgar v. Miller, 42 Ore. 55; 72 Pac. 319.

Walter v. Deering, (Tex. Civ. App.) 65 S. W. 380.

Cheeseman v. Nicholl, 70 Pac. 797.

Ind. Union R. Co. v. Houliham, 157 Ind. 494;
60 N. E. 943; 54 L. R. A. 787.

Trice v. Yoeman, 57 Pac. 955.

Sayre v. Burdick, 47 Minn. 367; 50 N. W. 245.

Sutherlin v. Broomer, 93 Pac. 134.

In the case of Sutherlin v. Bloomer, above cited, the Supreme Court of Oregon held that where a statement in a written instrument as to the consideration is of a contractual nature, as where the consideration consists of a specific contract and promise to pay one of the parties to perform certain acts, it cannot be changed or modified by parol or extrinsic evidence.

In the case of Trice v. Yoeman, *supra*, the court says in referring to the written instrument:

“In addition to the express mention of the sums to be paid, which of course implies the exclusion of an obligation to pay any greater or any other sums

and negative by their terms the obligation to pay anything additional. * * * These instruments not only constitute a contract to convey lands for a certain specified consideration but they in terms exclude the right to claim additional compensation for the conveyance."

The test of the admissibility of parol evidence where there has been a written agreement is whether or not the consideration expressed in the writing is by way of recital or whether it is contractual, and where the consideration is a matter of contract and the language used shows that it was plainly intended to conclusively show the full consideration, parol agreements are never admissible to impeach a written instrument, or vary, or contradict, or add to its terms. Where the parties have made the consideration in a written instrument contractual it becomes of the essence of the contract the same as any of its other provisions, and is subject to the same rules when attacked by parol evidence.

V.

The alleged parol agreement is not collateral to the written instrument.

The alleged parol agreement is not shown to be a collateral contract, but pertains to and involves the same services mentioned in the written personal service agreement, in which agreement plaintiff was to devote to the company his entire time and attention and perform such services for them as directed, and in fixing his per cent cost for the alleged "bonus" he includes the salary referred to in the written contract as part of the expenses, which conclusively shows that the services for

which he claims a "bonus" are the identical services which are provided for in the contract.

Plaintiff's second amended complaint clearly indicates that the services which he performed under the terms of his written contract, and for which he was paid a salary, are the identical services for which he now claims additional compensation, notwithstanding the fact that his contract provided that the salary should be **in consideration** of all services performed. The contract therefore makes this salary consideration of the essence of the contract, and defendant's promise to pay this salary is contractual, is the part of the contract to be performed on the part of the company and is not a matter of recital or acknowledgment. There was clearly a meeting of the minds of the contracting parties, and plaintiff was to perform such services as directed, the defendant to pay therefor the stipulated salary. Defendant cannot now claim that he was not to perform such services as directed, and that the services which he alleges as the basis of the alleged parol agreement were not included in the written contract. In computing the amount of his alleged "bonus" plaintiff uses as a basis the identical services provided for in the written contract and the salary paid him therefor, and the alleged parol agreement therefore does not involve a matter collateral to that provided for in the written contract, but involves the same matter, and this is shown by the pleadings.

VI.

The alleged agreement claimed by plaintiff is void for want of mutuality.

Rose v. Oliver, 32 Ore. 447; 52 Pac. 176.

Reid v. Savage, (Ore.) 117 Pac. 306.

Gaines v. Vandecar, (Ore.) 115 Pac. 721.

Plaintiff in error contends that defendant promised to pay him a certain bonus provided he would enter into its employment and remain during the entire year of 1909, but Cressey never at any time agreed with defendant that he would remain in its employ during the entire year of 1909; in fact, the written contract expressly provides that the agreement may be cancelled by either party thereto by giving written notice. There was, therefore, no consideration for the alleged promise of the Harvester Company to pay Cressey the bonus he claims. The alleged agreement is clearly unilateral and void for want of mutuality.

The case of Rose v. Oliver, above cited, which arose over an alleged agreement wherein it was claimed that one of the parties agreed that if his nephew would come to live with or near him so as to be accessible for help in case of emergencies, or when required by the uncle, that the uncle would devise his property to the nephew by last will and testament, and the court held that although the nephew lived with or near the uncle for a considerable portion of the time, inasmuch as he had never promised or agreed with the uncle that he would live with or near him the contract was void for want of mutuality and could not be enforced.

VII.

Usage cannot be shown to vary or contradict the express terms of a contract.

McCulsky v. Klosterman, 20 Ore. 108; 25 Pac. 366.

Holmes v. Whitaker, 23 Ore. 319; 31 Pac. 705.

VIII.

Plaintiff does not allege compliance with the alleged parol offer.

Plaintiff did not come within the conditions of the alleged contract, as his expense did not come within the schedule as pleaded and his per cent cost was greater than the standard fixed. Plaintiff alleges that the per cent cost on cash collected from January 1, 1909, to September 1, 1909, was not to exceed 7 per cent; that the per cent cost on claims secured was not to exceed 5 per cent during the same period. He states that the amount of notes and claims of said company secured and renewed during this period was \$12,340.05; that the total amount of expense incurred by him in making collections and procuring renewals, including his salary, was \$1590.41. His expense, therefore, was approximately 7.5 per cent of the amount of notes and claims secured during said period.

Plaintiff alleges that the total amount of claims secured by him from September 1, 1909, to January 1, 1910, was \$11,290.24; that the expense incurred by him during said period was \$884.47 (Transcript, page 26). The per cent cost, there-

fore, was approximately 7.8 per cent, whereas, according to the schedule pleaded (Transcript, page 25), the per cent cost was not to exceed 2 per cent during this season of the year.

Plaintiff alleges that the actual cost and expense to **defendant** was not to exceed the schedule named (Transcript, page 25), whereas he alleged in his allegations concerning actual expense "the total amount of expense incurred by **plaintiff**." He does not allege that the figures named by him as being **plaintiff's** expenses were the only actual costs and expenses of **defendant**.

Plaintiff has not, therefore, complied with the conditions of the alleged offer of a "bonus" or "commission."

IX.

A subsequent contract entered into by the parties concerning the same subject-matter and containing terms inconsistent with those of the prior contract, modifies the prior contract by implication, and the prior contract is merged in the latter.

Vol. 9 Cyc. p. 595.

Assuming then, for the purpose of argument only, that the alleged parol agreement claimed by plaintiff to have been made in August, 1908, as he alleges, the subsequent written contract entered into in August, 1909, is clearly inconsistent with the terms of the alleged parol contract, and any agreement, either parol or otherwise, would be merged in the subsequent writing, for it concerns the same subject-matter and contains terms inconsistent with the alleged previous contract.

To recapitulate, the judgment of the District Court on the first cause of action was correct for the following reasons, among others:

(1) Plaintiff's alleged cause of action is an attempt to modify, contradict and add to the terms of a written contract by an agreement, which is conceded by him to be in parol.

(2) The alleged parol agreement for the payment of commission or bonus would be within the statute of frauds for the reason that it was not to be performed within a year.

(3) The plaintiff does not bring himself within the conditions of the alleged offer.

(4) The alleged contract for commission or bonus would be void for want of mutuality.

(5) The alleged oral agreement for commission or bonus would be merged in the two subsequent written agreements, which were inconsistent with the terms of the alleged preceding oral contract.

Second Cause of Action.

Referring to the second cause of action in plaintiff's second amended complaint it will be noticed that the contract entered into in November, 1910, provided by mutual stipulation of the parties that the defendant could "terminate the agreement at any time for neglect of duty, refusal to follow instructions, or should it consider second party's work unprofitable or undesirable, in which event compensation shall cease the day and date the agreement is terminated."

Defendant having discharged plaintiff it neces-

sarily follows that defendant considered the plaintiff's services undesirable. The right to discharge plaintiff was clearly given by the contract, which does not state that defendant must prove or establish that plaintiff's services were undesirable, but by mutual contract it is provided that plaintiff could discharge the defendant if defendant should consider his services no longer desirable, and the contract especially provides that if the defendant should consider the plaintiff's services no longer desirable "compensation should cease the day and date the agreement was terminated." In view of the plain language of the writing, to hold that defendant could not discharge the plaintiff when it considered his services no longer desirable, would, it seems, deny the parties the right to contract.

In a bond reading that it will be redeemed if desired twelve years after date, "desired" is a synonym for "wished for" and gives the option of redemption to the holder.

Allentown School District v. Derr, 115 Pa. 439; 9 Atl. 55 and 56.

"Desired" is defined by the Standard Dictionary as "an earnest wishing for something," "a longing," "a craving."

From the plain wording of the contract, obviously it was intended that the Harvester Company was not to be obligated to retain Cressey in its employ any longer than it desired his services.

The cases cited by plaintiff in error are principally cases where work, labor and materials have been furnished, and the product was to be satisfactory to the other party. A different phase is

presented where a party has furnished either labor or materials which are of a benefit to him, and he is not allowed to declare them unsatisfactory without reason therefor. For instance, where a building constructed is to be approved by the architect, payment cannot be avoided by refusal of the architect to be satisfied unless he has a reason therefor.

The case of *Parlin, etc. v. City of Greenville*, 127 Fed. 55, cited by plaintiff in error, was a case where a structure had been completed and the same was to be satisfactory to the city, and it is therefore not in point here, for that was an executed contract.

The case of *Beissel v. Vermillion Farmers Elevator Co.*, 113 N. W. 575, cited by appellant, is not in point for the reason that that was a definite contract for a year, and the services in that case were to be "satisfactory" instead of "desirable."

The following authorities hold that when a contract provides by its terms that a master may discharge a servant when his services are not "satisfactory" the court has no authority to investigate or determine the question of whether or not the master had reasonable grounds upon which to base his dissatisfaction:

Allen v. Mutual Compress Co., 101 Ala. 574;
14 So. 362.

Bush v. Koll, 29 Pac. 919.

Teichner v. Pope Mfg. Co., 125 Mich. 91; 83
N. W. 1031.

Rossiter v. Cooper, 23 Vt. 522.

Cline v. Libby, 49 N. W. 832.

Gibson v. Crandage, 33 Amer. Reports 351.

McCurren v. McNulty, 7 Gray 139.

Tyler v. Ames, 6 Lans. 280.

In an action by a servant against the master for breach of contract for wrongful discharge he must allege in his complaint his own willingness to render further services and to perform the contract at the time of the alleged breach.

Marx v. Miller, 134 Ala. 347; 32 So. 765.

Quick v. Swing, 53 Ore. 149; 99 Pac. 418.

In the case of Quick v. Swing, above cited, the plaintiff failed to allege in his complaint that he had been damaged, and while judgment was sustained in the absence of a demurrer it is intimated that if the complaint had been attacked by demurrer the objection would have been well taken.

Plaintiff does not in any part of his cause of action allege that he was ready and willing to continue in the employment of the defendant, or ready and willing to perform the work required, which allegations are required in actions of this character.

In an action for the wrongful discharge of a servant the action is founded upon damage for breach of contract, and suit cannot be maintained to recover wages.

Winkler v. Racine Wagon Co., 99 Wis. 184;
74 N. W. 793.

26 Cyc. 1002.

No.

2200

4

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

UNITED STATES OF AMERICA,

Appellant.

vs.

W S. BENNETT and JOSEPHINE BENNETT,
his wife,

Appellees.

TRANSCRIPT OF RECORD.

*Upon Appeal from the United States District Court
for the Eastern District of Washington,
Northern Division.*

RECEIVED

FILED

NOV 13 1912

NOV 14 1912

J. D. MONCKTON,
CLERK

No.

IN THE
United States Circuit Court of Appeals
FOR THE
NINTH CIRCUIT.

UNITED STATES OF AMERICA,

Appellant.

vs.

W S. BENNETT and JOSEPHINE BENNETT
his wife,

Appellees.

TRANSCRIPT OF RECORD.

*Upon Appeal from the United States District Court
for the Eastern District of Washington,
Northern Division.*

INDEX.

	Page.
Addresses and Names of Solicitors of Record.....	1
Answer	7
Affidavit of W. S. Bennett	13
Affidavit of G. H. Wheeler	18
Assignment of Errors	244
Admission of Service of Copy of Proposed Bill of Exceptions	21
Bill of Complaint	1
Bennett, W. S., Affidavit of	13
Complaint, Bill of	1
Citation (Lodged Copy)	248
Certificate, Clerk's to Transcript of the Record.....	253
Decree	242
Decree, Discussion as to in Testimony.....	232-3-4
Exhibit "1" (Defendants'—Advertisement) intro- duced at	46
Exhibit "2" (Complainant's—Map) introduced at..	58
Exhibit "3" (Defendants'—Map) introduced at....	130
Names and Addresses of Solicitors of Record.....	1
Opinion	238
Order Allowing Appeal	247
Petition for Appeal	247
Petition for Appeal, Order Allowing.....	247
Praecipe for Transcript of the Record.....	250
Replication	20
Stipulation in Testimony as to Prior Right of De- fendants' to Use of Water, etc.....	120
Statement of Facts (Testimony)	22
Stipulation Extending Time for Printing Record until November 1, 1912.....	251

	Page.
Stipulation Extending Time for Printing Record until November 15, 1912	252
Testimony (Statement of Facts)	22
Testimony on Behalf of Complainant:	
MULDROW, W. C.	22
Cross-examination	34
Redirect Examination	44
Recross-examination	45
Re-redirect Examination	46
Recalled (in Rebuttal)	228
Recalled (in Rebuttal)	230
BONSTEDT, FERDINAND	47
Cross-examination	62
Redirect Examination	75
Recross-examination	80
Recalled (in Rebuttal)	218
Recalled (Cross-examination)	220
Recalled (in Rebuttal)	225
CASTILE, CALVIN	80
Cross-examination	84
Redirect Examination	87
Recalled (in Rebuttal)	226
HENDRICK, B. E.	88
Cross-examination	88
Redirect Examination	97
GEORGE, MILLARD H.	97
Cross-examination	100
EDWARDS, CHESTER	101
Cross-examination	104
Recalled (in Rebuttal)	229

Testimony on Behalf of Complainant:

SHULL, JAMES	106
Cross-examination	111
McLAIN, LAUGHLIN	114
Cross-examination	118
SHAW, --- (in Rebuttal)	229

Testimony on Behalf of Defendants:

WHEELER, G. H.	120
Cross-examination	130
Recalled for Complainant in Rebuttal	228
WHEELER, A. P.	142
Cross-examination	147
Recalled for Complainant in Rebuttal	227
ZEDIKER, C. M.	132
Cross-examination	138
Recalled for Complainant in Rebuttal	222
PAINE, F. C.	149
Cross-examination	152
CARPENTER, FRANK	153
Cross-examination	159
MUNSON, BYRON	161
Cross-examination	166
Redirect Examination	167
Recross Examination	168
FOLMSBEE, HARRY	168
Cross-examination	175
Redirect Examination	180
Recross Examination	181
CURTISS, A. A.	181
Cross-examination	184

	Page.
Testimony on Behalf of Defendants:	
Recalled by Complainant in Rebuttal	224
TAYLOR, WILSON M.	189
JONES, BERT	191
Cross-examination	192
BENNETT, W. S.	193
Cross-examination	207
Redirect Examination	210
Recalled by Complainant in Rebuttal.....	216

NAMES AND ADDRESSES OF SOLICITORS OF
RECORD.

OSCAR CALN, Esquire, United States District Attorney,
Federal Building, Spokane, Washington.

E. C. MACDONALD, Esquire, Assistant United States
Attorney, Federal Building, Spokane, Washington.

E. W. BURR, Special Assistant to the United States
Attorney, North Yakima, Washington,

Solicitors for Appellant.

SMITH & GRESHAM, Conconully, Washington,

HAPPY, CULLEN, LEE & HINDMAN, Hyde Block,
Spokane, Washington,

Solicitors for Appellees.

No. 1271.

*In the District Court of the United States, Eastern District
of Washington, Northern Division.*

UNITED STATES OF AMERICA,

Complainant,

v's.

W. S. BENNETT and JOSEPHINE BENNETT,
his wife,

Defendants.

BILL OF COMPLAINT.

To the Honorable Judge of the District Court of the
United States for the Eastern District of Washington,
sitting in equity:

Comes now the United States of America, by Oscar
Cain, United States Attorney, and E. C. Macdonald,
Assistant United States Attorney for the Eastern District
of Washington, and brings this its bill against
W. S. Bennett and Josephine Bennett, his wife, and
thereupon plaintiff says:

	Page.
Testimony on Behalf of Defendants:	
Recalled by Complainant in Rebuttal -----	224
TAYLOR, WILSON M. -----	189
JONES, BERT -----	191
Cross-examination -----	192
BENNETT, W. S. -----	193
Cross-examination -----	207
Redirect Examination -----	210
Recalled by Complainant in Rebuttal -----	216

NAMES AND ADDRESSES OF SOLICITORS OF
RECORD.

OSCAR CAIN, Esquire, United States District Attorney,
Federal Building, Spokane, Washington.

E. C. MACDONALD, Esquire, Assistant United States
Attorney, Federal Building, Spokane, Washington.

E. W. BURR, Special Assistant to the United States
Attorney, North Yakima, Washington,

Solicitors for Appellant.

SMITH & GRESHAM, Conconully, Washington,

HAPPY, CULLEN, LEE & HINDMAN, Hyde Block,
Spokane, Washington,

Solicitors for Appellees.

No. 1271.

*In the District Court of the United States, Eastern District
of Washington, Northern Division.*

UNITED STATES OF AMERICA,

Complainant,

vs.

W. S. BENNETT and JOSEPHINE BENNETT,
his wife,

Defendants.

BILL OF COMPLAINT.

To the Honorable Judge of the District Court of the
United States for the Eastern District of Washington,
sitting in equity:

Comes now the United States of America, by Oscar
Cain, United States Attorney, and E. C. Macdonald,
Assistant United States Attorney for the Eastern District
of Washington, and brings this its bill against
W. S. Bennett and Josephine Bennett, his wife, and
thereupon plaintiff says:

I.

That this action is prosecuted at the request of the Secretary of the Interior and under the direction of the Attorney General of the United States.

II.

That the defendants, at all the times hereinafter mentioned were, and now are, husband and wife, residing in Okanogan County, State of Washington.

III.

That under and by virtue of an Act of Congress entitled, "An Act appropriating the receipts from the sale and disposal of public lands in certain states and territories to the construction of irrigation works for the reclamation arid lands," approved June 17, 1902 (32 Stat. L. 388), there have been examined, surveyed, located, and are now in active operation, extensive irrigation works for the storage, diversion and development of waters for the reclamation of arid lands in Okanogan County, which is commonly known as the Okanogan Project.

IV.

That the plaintiff has availed itself of the provisions of an Act of the legislature of the State of Washington, entitled, "An act relative to the appropriation of waters of the state for irrigation purposes, granting to the United States the right of exercising the power of eminent domain in acquiring lands, water and other property for rights-of-way, and for reservoir and other irrigation woks, granting to the United States certain rights in state lands and waters of the state, relating to water users's associations, and declaring an emergency,"

approved March 4, 1905 (Laws 1905, p. 180), and by virtue of and in compliance therewith has appropriated large quantities of water in Okanogan County, which is being distributed, stored and developed.

V.

That plaintiff, in the year 1905, and pursuant to the two acts aforesaid, appropriated all of the unappropriated waters of Salmon River, in Okanogan County, for the purposes aforesaid; that the works necessary for the utilization of the water so appropriated and stored, have been constructed and the said waters have been put and devoted to beneficial uses in accordance with law to a large number of persons occupying adjacent land, which, without such water, would be valueless and incapable of cultivation; that the amount of water available from all sources of supply for the benefit of such water right applicants in the Okanogan Project during the year 1911 was found to be insufficient and there was a shortage of water during the latter portion of said irrigation season.

VI.

That the defendants claim to be the owners of and are in possession of the following described lands in Okanogan County, Washington, to-wit: The West Half of the Southeast Quarter of Section Thirty-six (36), Township Thirty-four (34), and the Southwest Quarter of the Northwest Quarter and Lot Two (2), of Section One (1), Township Thirty-three (33) North of Range Twenty-five (25), East of the Willamette Meridian.

VII.

That of the lands just described there are susceptible

to irrigation not to exceed fifty (50) acres; that such lands require not more than two and a half ($2\frac{1}{2}$) acre feet per acre of water to sufficiently and properly irrigate the same; that the use of a greater amount of water is not only unnecessary, but absolutely detrimental to the growing of crops thereon; that notwithstanding this, the defendants have unnecessarily, wastefully and uselessly diverted, consumed and used of and from the waters of the said Salmon River about eleven (11) acre feet per acre of water in each season, thereby depriving the plaintiff of water which it could and otherwise would have used for the necessary and beneficial purposes aforesaid.

VIII.

That by reason of such unnecessary diversion of water by the defendants, the plaintiff and those depending upon it for their supply of water are greatly damaged in this: That plaintiff is unable to furnish a sufficient amount of water to irrigate the lands of such persons, whereby a large area of land, which otherwise could by plaintiff be supplied with an adequate amount of water for irrigation purposes, is deprived of a sufficient amount to properly cultivate and improve the same.

IX.

That the defendants threaten to, and will, unless restrained by an order from this Honorable Court, continue to divert large quantities of water in excess of what they are rightfully entitled and can beneficially use, and that as a result thereof a large number of persons will, during the irrigation season of 1912, and thereafter, be deprived of a sufficient amount of water

to properly cultivate their lands; that such lands so deprived of water will be, at least in part, rendered unfit for cultivation and valueless.

X.

That the point in the said Salmon River at which the defendants divert, and will continue to divert, the waters as aforesaid, is above the works of the plaintiff from which it supplies the water to the lands hereinbefore referred to, by reason whereof plaintiff is unable to exercise any control of such water and cannot prevent the defendants from such diversion, save by an injunction of this court.

XI.

That plaintiff is remediless at law, and no plain, adequate or speedy remedy may be afforded, save in a tribunal exercising chancery powers.

IN CONSIDERATION WHEREOF, and forasmuch as plaintiff cannot have any adequate relief except in this court, and to the end, therefore, that the defendants may, if they can, show why plaintiff should not have the relief prayed for, and may make a full and adequate disclosure of all matters aforesaid, and according to the best and utmost of their remembrance, knowledge, information and belief, full, true, direct, and perfect answer make to the matters hereinbefore stated and charged, but not under oath, an answer under oath being expressly waived.

And plaintiff prays that your Honor may, pending the determination of this action, grant a temporary injunction, commanding the defendants, and each of them, their, and each of their agents, servants and employees,

to abstain and refrain from diverting, consuming, using or taking from the said Salmon River any water in excess of two and a half ($2\frac{1}{2}$) acre feet per acre in any irrigation season for the irrigation of their said lands, and that on the final hearing of this cause such injunction be made permanent.

MAY IT PLEASE YOUR HONOR to grant unto plaintiff a writ of subpoena to the said W. S. Bennett and Josephine Bennett, his wife, and to such others as in the discretion of your Honor appear necessary for the hearing and determination of this case, commanding them on a day certain to appear and answer unto this bill of complaint and to abide and perform such order and decree in the premises as to the court may seem proper and required by the principles of equity and good conscience.

(Signed) OSCAR CAIN,

United States Attorney.

(Signed) E. C. MACDONALD,

Assistant United States Attorney.

Indorsements: Bill of Complaint in Equity.

Filed January 15, 1912.

W. H. HARE, Clerk.

By S. M. RUSSELL, Deputy.

No. 1271.

*In the District Court of the United States, Eastern Dis-
trict of Washington, Northern Division.*

UNITED STATES OF AMERICA,

Complainant,

vs.

W. S. BENNETT and JOSEPHINE BENNETT,
his wife,

Defendants.

ANSWER.

Come now W. S. Bennett and Josephine Bennett, his wife, and by way of answer to the plaintiff's complaint herein, alleges:

I.

That they admit paragraphs One, Two, Three and Six of said complaint.

II.

Admit that the plaintiff has availed itself of the Act of Legislature of the State of Washington, approved March 4, 1905, as alleged in paragraph IV of the complaint herein, but deny that they have any information sufficient to form a belief as to what, if any, water the plaintiff has appropriated.

III.

Answering paragraph V of the complaint, the defendants allege that they have reason to believe, and do believe, that the plaintiff has appropriated, or attempted to appropriate, all of the unappropriated waters of Salmon Creek, as alleged in paragraph V of the complaint herein, and admit that the plaintiff has constructed extensive works for the utilization of said waters, and the

defendants deny that they have any knowledge or information sufficient to form a belief as to any other matters or things set up in said paragraph V, and therefore deny the same and the whole thereof, except that the lands referred to in said paragraph are dry and arid, and will not produce crops in paying quantities without water for artificial irrigation.

IV.

Answering paragraph VII of the complaint, the defendants deny that they have but fifty acres susceptible to irrigation, and deny that two and one-half acre feet per acre of water is sufficient to irrigate the same, and deny that they have used eleven acre feet per acre of water from Salmon River or any other quantity in excess of one miner's inch under six inch pressure per acre to irrigate their said lands, and deny that they have at any time deprived the plaintiff of any water whatever to which it was entitled. And further answering said paragraph, the defendants allege that they have under actual irrigation, on their said lands, 62.82 acres, and the same has been under irrigation from the waters of Salmon River for something like twenty-five years last past, and that one miner's inch per acre of the waters of said stream are absolutely necessary and required for the successful growing of crops on said lands.

V.

Answering paragraph VIII of the complaint, the defendants deny that they have ever at any time used any water belonging to the United States, or to which it was entitled, and deny that they have ever used any water except that which lawfully and rightfully belongs to

them, and deny that they ever used any quantity in excess of their actual needs, and deny that plaintiff has suffered any damage by reason of any use of the waters of Salmon River by the defendants.

VI.

Defendants deny paragraph IX of the complaint, and the whole thereof.

VII.

Answering paragraph X of the complaint, the defendants admit that their point of diversion is above the diversion works of the plaintiff, from which it supplies a portion of the lands under the Okanogan Project, but allege that their said ditch and diversion works were constructed many years prior to any rights by the United States of America, to the waters of said Salmon River, and many years prior to the construction by the United States of America of any diversion works, or the taking of any initial steps looking thereto, and they admit that they have at all times insisted upon controlling their own diversion works, and diverting water to which they are lawfully entitled and no more.

VIII.

The defendants deny each and every other allegation, matter and thing, and the whole thereof, in the complaint contained, except such as herein specifically qualified or admitted.

AFFIRMATIVE DEFENSE AND CROSS-
COMPLAINT.

By way of affirmative defense and cross-complaint, against the plaintiff, the defendants complain and allege:

I.

That the defendants are husband and wife.

II.

That the defendants are the owners in fee simple, in possession, and entitled to the possession, of the following described real estate in Okanogan County, State of Washington, to-wit: The west half of the southeast quarter of Section 36, Township 34 north; the southwest quarter of the northwest quarter, and Lot 2 in Section 1, Township 33, North of Range 25, E. W. M.

III.

That some time prior to the year 1890, one Nathan Smye, who had all the qualifications of a homestead settler and entryman, under the homestead laws of the United States, made homestead settlement on the above described lands of the defendants, and thereafter continued to reside upon and cultivate the same, and on the 13th day of October, 1898, the United States issued to him its patent therefor.

IV.

That in the year 1890, as defendants are informed and believe, said Nathan Smye constructed the Spring Coulee Irrigation Ditch, which is the same and identical ditch now owned and used by the defendants and complained of by the plaintiff. That the said ditch as constructed by the said Smye had a carrying capacity of more than two cubic feet of water per second of time,

and the said Smye, upon the completion of said ditch, in the year aforesaid, diverted the waters of said Salmon River through said ditch, to the extent of two cubic feet per second of time, and used the same upon the said lands now owned by the defendants for the irrigation of hay, grain and vegetable crops thereon.

V.

That the said Smye proceeded with all diligence to bring his said lands under irrigation, and at the time the defendants purchased the same in the year 1902, there was under irrigation thereon something like fifty acres. That about the year 1903 the defendants increased the irrigable area of their said lands to 62.82 acres.

VI.

That the defendants and their grantor and predecessor in interest have always devoted the said lands to the growing of timothy, alfalfa and clover hay, grain and vegetables, and a small family orchard. That said lands are dry and arid and will not produce any of said crops in paying quantities without the use of water for artificial irrigation, and one miner's inch of water, under a six inch pressure from the waters of Salmon Creek, are absolutely necessary to irrigate said land and crops.

VII.

That the defendants intend permanently to devote their said lands to the growing of timothy, clover and alfalfa hay, grain, roots and vegetables, and a small family orchard. That for more than twenty years last past the defendants and their grantor and predecessor in interest have diverted and used that amount of water

from the waters of Salmon Creek, through said Spring Coulee Ditch, for the irrigation of said crops, on their said lands, and they are the owners of an undivided one-eighth interest in said ditch, and are the owners of the first and prior right to divert two cubic feet of water per second of time from the waters of said Salmon River, for irrigation, stock and domestic purposes.

VIII.

In pleading the miner's inch, and cubic feet per second of time of water herein, the defendants have pleaded on the basis of forty miner's inches under a six inch pressure, equaling one cubic foot per second of time, and that one miner's inch per acre is necessary at the land of the defendants, instead of at the point of diversion.

IX.

That at the time of the construction of said ditch by the defendants' grantor and predecessor in interest, and at the time he diverted and used the waters of Salmon Creek for the irrigation of said land as aforesaid, said waters were unappropriated public waters of the United States, subject to appropriation, and the point of appropriation and diversion was on public land of the United States.

WHEREFORE, by reason of the law and the premises, the defendants pray judgment as follows:

I.

That they be decreed to be the owners of and entitled to one-eighth interest in and to the said Spring Coulee ditch, and the first and prior right to divert and use two cubic feet of water per second of time from the waters of Salmon Creek for the irrigation of their said lands, and for stock and domestic purposes thereon.

II.

That their title thereto be forever quieted.

III.

That the plaintiff, and all persons claiming through or under it, be perpetually and forever enjoined from in any manner interfering with the defendants in their right to divert and use two cubic feet of water per second of time from the waters of Salmon Creek, and for their costs and disbursements in this action.

IV.

Defendants pray for general relief.

(Signed) SMITH & GRESHAM,
Attorneys for Defendants.

No. 1271.

In the District Court of the United States, Eastern District of Washington, Northern Division.

UNITED STATES OF AMERICA,

Complainant,

vs.

W. S. BENNETT and JOSEPHINE BENNETT,
his wife,

Defendants.

AFFIDAVIT OF W. S. BENNETT.

UNITED STATES OF AMERICA,

Eastern District of Washington—ss.

I, W. S. Bennett, of Okanogan County, Washington, being first duly sworn, upon oath depose and say:

1. That I am one of the defendants above named, and make this affidavit for and on behalf of myself and for and on behalf of my co-defendant, Josephine Bennett.

2. That I and my co-defendant are the owners by mesne conveyances of the following described real estate in Okanogan County, Washington, to-wit: The west half of the southeast quarter of Section 36, Township 34 north; the southwest quarter of the northwest quarter, and Lot 2 in Section One, Township 33, North of Range 25, E. W. M., which is community property. That said lands are dry and arid, and require water for irrigation to produce crops in paying quantities.

3. That some twenty or twenty-five years ago, one Smye made homestead settlement on the above lands of the defendants, and continuously thereafter maintained his residence thereon; and when said lands were thrown open for homestead entry said Smye made homestead entry thereof at the proper United States Land Office and complied with all the laws of the United States relative thereto, and homestead patent duly issued to him on October 13, 1898.

4. That about the year 1890, said Smye constructed what is known as the Spring Coulee Irrigation Ditch (the ditch referred to in this action) and by means of which he diverted the waters of Salmon River to and upon the above described lands of the defendants. That at the time said Smye constructed said ditch and diverted the waters of Salmon River as aforesaid, the lands over which said ditch was constructed was public lands of the United States, and the waters of said Salmon River unappropriated public waters of the United States, and for the twenty-five years last past the said lands of the defendants have been irrigated from the waters of said Salmon River through said ditch.

5. That some two years after said Smye constructed said ditch and diverted the waters of Salmon River as aforesaid, and on the 11th day of August, 1892, he recorded a notice of water right to 150 miner's inches of water from said Salmon River, diverted through said ditch, and conveyed it onto the said lands of the defendants; that the waters of said Salmon River so diverted by the defendants, and their grantor and predecessor in interest, were at all times herein used for a beneficial purpose, namely, the irrigation of said lands and for stock and domestic purposes. That the crops grown on said lands by the defendants and their predecessor in interest have at all times been timothy, alfalfa and clover, hay, fruits, grain and vegetables, and the amount of water used and necessary to be used on said lands for the irrigation of said crops has at all times been, and still is, one miner's inch under a six inch pressure per acre, and the amount of land so irrigated by the defendants and their grantor and predecessor in interest is 63.82 acres.

6. That there is a natural swamp on the said lands of the defendants, consisting of 20.22 acres; that said swamp has existed there from time immemorial, and was not created nor augmented by any wasteful use of the waters of said Salmon River, by the defendants or their predecessor in interest, or any other person.

7. That three acre feet of water under the Government Okanogan Project is practically one-half of the miner's inch under a six inch pressure, but it is well understood and universally conceded throughout the Okanogan country, and especially in the vicinity of the

lands of the defendants, that one miner's inch of water under a six inch pressure is necessary and required properly to irrigate the kinds of crops grown by the defendants on said lands, namely, timothy, alfalfa and clover, hay, grain and vegetables, and it is also well understood and generally conceded that such crops require at least twice as much water for irrigation as orchards. That the lands under the Okanogan Irrigation Project are devoted exclusively to orchard purposes, having been recently set to young trees.

8. That the defendants are the owners by purchase from said Smye of the lands hereinbefore described, and all of said Smye's water rights and rights in and to said Spring Coulee Irrigation Ditch.

9. That some nine or ten years ago the defendants, with others, enlarged said ditch, for the purpose of accommodating and irrigating lands owned by other persons lower down in said Spring Coulee, and the defendants are the absolute owners of a one-eighth interest in and to said ditch.

10. That said ditch, and ditch rights, of the defendants, and their right to divert and use the waters of said Salmon Creek, were acquired and perfected long prior to any rights initiated or acquired by the United States of America, but the United States, acting through its Project Engineer, Fred Bonstedt, has wrongfully and arbitrarily and persistently interfered with the head gate and intake of the defendants, seeking to limit them to $2\frac{1}{2}$ or 3 acre feet of water, well knowing that the defendants are the rightful owners of a greater amount

of water, namely, substantially two cubic feet per second of time, and well knowing that the said lands of the defendants require that amount of water for the irrigation of the defendants' crops growing thereon.

11. The defendants have never used or claimed any right to use or divert more than two cubic feet of water per second of time, and have never used or claimed any right to use any water owned by the United States, or any other person, and have never interfered with any works or water belonging to the United States which it has acquired for use in connection with the Okanogan Irrigation Project, and does not claim any right to do so, but only ask that they be allowed to use their own water, and their own ditch.

(Signed) W. S. BENNETT.

Subscribed and sworn to before me this 22d day of January, A. D. 1912.

(Signed) P. M. SNIDER,

Notary Public, residing at Okanogan, Washington.

My commission expires Feb. 14, 1913.

(Notarial Seal.)

No. 1271.

In the District Court of the United States, Eastern District of Washington, Northern Division.

UNITED STATES OF AMERICA,

Plaintiff.

v's.

W. S. BENNETT and JOSEPHINE BENNETT,
his wife,

Defendants.

AFFIDAVIT OF G. H. WHEELER.

UNITED STATES OF AMERICA,
Eastern District of Washington—ss.

I, G. H. Wheeler, being first duly sworn, upon oath depose and say:

I.

That I am now, and for more than fifteen years last past, have been, a surveyor and civil engineer.

II.

That on the 21st, 22d and 23d days of June, 1909, I made an accurate and actual survey in the field of the irrigated lands of W. S. Bennett and Josephine Bennett, his wife, in Okanogan County, Washington, to-wit:

The west half of the southeast quarter of Section 36, Township 34, north, Range 25, E. W. M., and Lot 2, and the southwest quarter of the northeast quarter of Section 1, Township 33, north, of Range 25, East, and I found under actual irrigation thereon 62.82 acres.

III.

I also found on said lands a natural swamp consisting of 20.22 acres.

IV.

I found said irrigated lands of the said defendants devoted to the growing of timothy, clover and alfalfa hay, grain, vegetables and a small family orchard.

V.

I am also familiar with irrigation in the Okanogan country, and know the duty of water for irrigation therein, and know the duty of water on the said lands of the defendants, and know that one miner's inch under

a six inch pressure per acre is necessary and required to irrigate said lands of the defendants.

VI.

I further state that in my opinion it is necessary for the said defendants to divert from Salmon River two cubic feet of water per second of time, in order sufficiently and properly to irrigate their said lands and for stock and domestic purposes thereon.

(Signed) G. H. WHEELER.

Subscribed and sworn to before me this 22d day of January, A. D. 1912.

(Signed) P. D. SMITH,

Notary Public, residing at Conconully, Washington.

(Notarial Seal.)

Endorsements: Answer of Defendants and Counter Affidavits.

Filed February 1, 1912.

W. H. HARE, Clerk.

By S. M. RUSSELL, Deputy.

No. 1271.

In the District Court of the United States, Eastern District of Washington, Northern Division.

UNITED STATES OF AMERICA,

Complainant,

vs.

W. S. BENNETT and JOSEPHINE BENNETT,
his wife,

Defendants.

REPLICATION TO THE ANSWER OF DEFENDANTS W. S. BENNETT AND JOSEPHINE BENNETT.

This replicant, saving and reserving to itself all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of said defendants, for replication thereunto sayeth that it does and will ever maintain and prove its said bill to be true, certain and sufficient in the law to be answered unto by said defendants, and that the answer of said defendants is very uncertain, evasive and insufficient in the law to be replied unto by this replicant; without that, that any other matter or thing in the said answer contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed, or avoided, traversed, or denied, is true; all which matters and things this replicant is ready to ever maintain and prove as this Honorable Court shall direct, and humbly as in and by its said bill it has already prayed.

(Signed) OSCAR CAIN,

United States Attorney.

(Signed) E. C. MACDONALD,

Assistant United States Attorney.

Endorsements: Replication.

Filed February 9, 1912.

W. H. HARE, Clerk.

By S. M. RUSSELL, Deputy.

No. 1271.

In the District Court of the United States, Eastern District of Washington, Northern Division.

UNITED STATES OF AMERICA,

Complainant,

vs.

W. S. BENNETT and JOSEPHINE BENNETT,
his wife,

Defendants.

ADMISSION OF SERVICE OF COPY OF PROPOSED BILL OF EXCEPTIONS.

We hereby admit the receipt of a copy of plaintiff's proposed Bill of Exceptions now on file herein.

Dated this 26th day of September, 1912.

(Signed) SMITH & GRESHAM,
Attorneys for Defendants.

Endorsements: Admission of Service of Copy of Proposed Bill of Exceptions.

Filed September 27th, 1912.

W. H. HARE, Clerk.

By S. M. RUSSELL, Deputy.

No. 1271.

In the District Court of the United States for the Eastern District of Washington, Northern Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

W. S. BENNETT and JOSEPHINE BENNETT,
his wife,

Defendants.

Testimony of W. C. Muldrow.

Before Honorable Frank H. Rudkin, Judge Presiding.

Appearances:

For the Plaintiff,

Messrs. Cain & Macdonald and E. W. Burr.

For the Defendants,

Messrs Smith & Gresham and W. W. Hindman.

STATEMENT OF FACTS.

BE IT REMEMBERED, that this cause came on for trial this 31st day of May, 1912, at 10 o'clock a. m., before Honorable Frank H. Rudkin, judge presiding, the plaintiff being represented by Messrs. Cain & Macdonald and E. W. Burr, Esq., and the defendants appearing in person and by their attorneys, Mr. Smith, Esq., and W. W. Hindman, Esq.

THEREUPON the following proceedings were had and done, to-wit:

Mr. SMITH: If the Court please, at this time we should like to have the name Messrs. Happy, Cullen, Lee & Hindman associated for the defense.

The COURT: Very well; the Clerk is not here, but it will be so ordered.

Testimony of W. C. Muldrow.

W. C. MULDROW, a witness called and sworn on behalf of the Government, testified as follows:

DIRECT EXAMINATION.

By Mr. BURR:

Q. Your name, please?

A. W. C. Muldrow.

Q. What is your occupation, Mr. Muldrow?

A. Irrigation engineer.

Testimony of W. C. Muldrow.

Q. Will you state your experience in irrigation engineering, please?

A. Why, I began work with the Engineering Department of the Reclamation Service in 1903 in Arizona and Oregon; in that work until the fall of 1909. After that time I was engaged in private practice, that is, except for a brief period of about four months in the fall of 1905, I was out of the Government service, and I was back with them until 1909, and since that time in private practice in Okanogan County.

Q. How long in Okanogan County altogether?

A. Since November—well, I worked for the Reclamation Service on the Conconully dam in the summer season of 1909. Since that time——

Q. How much experience have you had in the measurement of water?

A. Well, I had charge of hydrographic work for the Reclamation Service in the summers of 1906 and 1907, the season of 1906 and 1907, about a year and a half in all exclusively. Besides that I have measured water more or less at all times during by experience in irrigation work.

Q. Have you had official connection as a commissioner of the County of Okanogan, water commissioner of the County of Okanogan?

A. I was appointed water commissioner in the spring of 1907, and served during that season.

Q. In such capacity, what were your duties?

A. Well, my duties were to measure the flow and regulate the headgates of all irrigation canals, taking

Testimony of W. C. Muldrow.

water out of Salmon Creek in such manner that each should get the amount of water to which he was entitled.

Q. Will you state where the Spring Coulee canal, so-called, is with reference to the Government irrigation project known as the Okanogan Project?

A. It takes water from Salmon Creek on the west side about three miles, I should judge—I don't know the exact distance—above the diversion weir of the Government main canal.

Q. Will you state where the lands of the defendant are with reference to the Spring Coulee canal headgate?

A. The lands of the defendant which lie along this Spring Coulee ditch and receive water from it are approximately—well, I never made any measurements to find out the exact distance, either.

Q. Roughly speaking?

A. Something about two miles below the headgate of the Spring Coulee ditch, I think.

Q. What is the area of the land under cultivation on defendant's ranch, if you are familiar with it?

A. I am not familiar enough to give definite figures; my understanding has always been about sixty acres.

Q. Never mind, I will prove that by another witness. Did you take any measurements of the water being received by Mr. Bennett, as water commissioner, or in any other capacity?

A. At one time I made a measurement of the water that was actually being diverted on Mr. Bennett's ranch, but not in the capacity as water commissioner.

Q. What amount of water was at that time flowing on the defendants' ranch?

Testimony of W. C. Muldrow.

A. The amount that was taken out of the ditch on his ranch was, according to my notes, taken at the time, 1.64 cubic feet per second.

Mr. SMITH: I did not quite hear that.

A. The amount was 1.64 cubic feet per second.

Q. Did you ever take any other measurements of the amount of water flowing from the Spring Coulee canal and on to the defendants' place?

A. No, I did not.

Q. Did you measure the amount of water being received by the Spring Coulee canal

A. Yes, a number of times.

Q. And what was that amount?

A. Well, that amount varied from around ten cubic feet down to 4.8 cubic feet.

The COURT: What canal is that?

Mr. SMITH: The Spring Coulee canal?

The COURT: Is that the Government canal?

Mr. BURR: No, that is the canal from which the defendant receives his water supply which takes it above the Government canal headgate.

Q. Did you ever compute the loss in transit from the headgate of the Spring Coulee canal to the defendant's place of diversion?

A. I did at one time.

Q. Will you state what that loss was?

A. Well, the measurements made at that time, the headgate flow was 4.88 cubic feet per second, according to meter measurement made as accurately as possible, and the loss down to the point of diversion on Mr. Ben-

Testimony of W. C. Muldrow.

nett's place was .7 of a cubic foot, the total percentage of loss about 14½ per cent.

Q. Do you regard that as an excessive loss?

A. For ditches in ordinary condition in that country that is about a nominal, fairly conservative figure.

Q. What is the ordinary condition of ditches in that country; are they so constructed as to give due economy, the private ditches, to which I presume you are comparing this, are they so constructed to be economical in the use of water?

A. I believe that they are not.

Mr. SMITH: If the Court please, I believe the ditch in controversy is the only ditch that is in controversy in this case. I shall object to any other ditches.

The COURT: Will other parties take water out of this ditch except the defendant?

Mr. BURR: Yes, there are quite a number of parties use water out of this ditch. It seems to me that the loss from the headgate of the canal to the point of the defendant's diversion is in issue.

The COURT: What is this company, a corporation?

Mr. BURR: The defendant?

The COURT: No, this company you speak of.

Mr. BURR: It is incorporated. It is virtually a partnership ditch, and if the loss is approximately that of the ditches of the country it seems to me that the character of the ditches of the country is material in this point in this case.

The COURT: Read the question.

(Last question read).

Testimony of W. C. Muldrow.

The COURT: He may answer the question, although I think it would be better to confine it to this particular ditch.

A. As a rule the older ditches in the country are not very well constructed as to grade and alignment, and have generally a larger seepage loss than would be consistent with economy.

Q. What do the defects in the Spring Coulee ditch such as to make such a large loss of water consist of?

Mr. HINDMAN: I think that is objectionable, your honor, and improper.

Mr. BURR: The point of diversion, your honor, is the point of measurement, which has been the custom of the country in the Okanogan district with regard to contract with the Federal Government, is the point of diversion from the Salmon River.

The COURT: Is there a contract between the defendant and the——

Mr. BURR: This is the only person in the Okanogan country taking out of the river below our reservoir who has not a contract with this Government; and it seems to me that the condition of the canal from its point of diversion, which we would pray to make the point of measurement in the decree, in accordance with all the other contracts upon that ditch, it seems to me that the condition of the canal from that point to the headgate is strictly material.

The COURT: You may answer the question.

A. Well, the ditch in that stretch we have under consideration is to a large extent in pretty fair condition.

Testimony of W. C. Muldrow.

The only defects that would cause excessive loss by seepage are in one or two points, excessive grade causing erosion of the bottom and preventing the sealing-up process that saves seepage.

Q. Will you state the duty of water which is general in the Okanogan country in some detail?

A. The duty of water——

Mr. HINDMAN: I object to that, your honor; I cannot see how it is material.

The COURT: It is a pretty broad question, it seems to me.

Mr. BURR: If your honor please, I believe that the duty of water in a country is material evidence with regard to the duty of water on this particular tract of land. It seems to me that if there are contracts as to the duty of water throughout that country it is strictly material as to the amount of water which this defendant needs. The custom of the country is, I believe, good evidence.

Mr. HINDMAN: Our allegations are, your honor, that we have used this water for a period of twenty-five years, and that it has been put to a beneficial use. That if the prescription has not run against it, then it is a question as to what this kind and character of land which Mr. Bennett is putting this water on, is how much water it requires to irrigate it. It seems to me absolutely immaterial what contract the reclamation people have taken in.

The COURT: It seems to me that this question taking in the whole Okanogan country is too broad for the report or anything else. I am familiar enough with irri-

Testimony of W. C. Muldrow.

gation to know that it will go twice as far on some lands as on others. I presume that is as true in the Okanogan country as anywhere else.

Mr. BURR: I expect to prove the character of the land itself, and it seems to me it is competent evidence, and I think I can refer your honor to authorities.

The COURT: You may proceed. I am sitting here merely as a commissioner to take this testimony. I will throw out what I consider worthless.

Mr. HINDMAN: Take an exception to the ruling of the Court.

(Last question read).

A. Well, the duty of water as defined by the contract——

Q. I would like to amend that question, if I may, to lands similar to these; that will make that strictly relevant. What is the duty of water on land in the Okanogan country similar to that?

Mr. HINDMAN: I don't think the witness is qualified yet.

The COURT: I think he has at least testified to considerable knowledge of irrigation up there. You may answer.

A. Well, the duty of water as defined by the irrigation contract existing between the irrigation companies and the——

Mr. HINDMAN: I object to that as incompetent. The question of what the irrigation people may have contracted for does not prove the character of this land.

Testimony of W. C. Muldrow.

Mr. BURR: It proves the custom of the country in regard to the duty of water.

Mr. HINDMAN: I beg to differ with you. You cannot get the custom in a year or two. The question is as to the custom between parties, not customs by contract.

The COURT: I don't think so myself. You may answer the question.

A. Well, the contracts for water under the irrigation project there, which practically covers all of the land where such contracts exist, that is close to this land here, of two classes, the old water rights, so-called, which call for three acre feet at the point of diversion during the irrigation season, and the new contract or subscription contracts which the later lands watered by the Government have, which call for two and a half acre feet of water. The private companies, all the private companies over here in that vicinity generally contract for three acre feet.

Q. When those amounts are received and used upon the land, does that furnish sufficient water for practical irrigation?

Mr. HINDMAN: I am going to object, your honor, until he designates the purpose for which it is used, as to whether he knows. Every kind of grain and fruits, and so forth, requires different amounts.

The COURT: That is undoubtedly true.

Q. I will amend that to read first as to fruits.

A. There is no doubt in my judgment that it does.

Q. Is that sufficient as to grain?

A. It is.

Testimony of W. C. Muldrow.

Q. Is it sufficient for alfalfa and forage crops?

A. It is on certain lands.

Q. What kind of lands is it sufficient for alfalfa and forage crops?

A. On the heavier types of land which are not too porous, underlain by a too porous strata.

Q. Will you now describe so far as you are familiar with the defendant's lands the character of the soils upon the defendant's land?

Mr. SMITH: I object to that question, your honor; he has not shown that he knows.

The COURT: That part which is irrigated is the only part in controversy.

Mr. BURR: Yes, sir.

Mr. SMITH: The witness has not shown that he knows anything about the character of the soil.

Mr. SMITH: Q. Will you state, Mr. Muldrow, your familiarity, so far as you are familiar with it, of the lands of the defendant?

A. Why, I have been over the land a number of times, been across it, up and down the ditch there, making measurements. I have been out on it while it was being irrigated, and I know in pretty fair detail about the character of the soil.

Q. What is the character of the soil?

A. Well, it is in general, the volcanic ash soil that is common to all that country; some of it more or less gravelly; some of it has got large boulders in it in places.

Q. What does that character of soil require in the way of a water supply in the Okanogan country?

Testimony of W. C. Muldrow.

A. Well, as far as the actual quantity of water is concerned, that is actual quantity that has been used on any particular tract, there is very little data existing. That is, I mean in an individual case, on an individual tract. It is necessary to go to large bodies in order to determine anything about the actual quantity of water.

Q. Well, what is the best of your judgment as to that character of soil and its needs for water supply for alfalfa?

A. That also hinges in my judgment to some extent on the point at which the general policy would step in to forbid the use of an undue quantity of water upon any particular tract of land on account of the greater value of that quantity of water over an area.

The COURT: That is not the question here at all. That man has appropriated the water, and he is entitled to whatever is necessary to irrigate that land.

A. (Continuing) From that standpoint I would not consider myself competent to speak, to state the exact quantity of water that it would require to raise alfalfa on the defendant's land.

Q. Will you state the character of the defendant's land with regard to the manner in which that land is prepared for irrigation?

Mr. SMITH: If the court please, to save a point at this time we shall object to that question and any examination on that line for this reason, the Government is a junior appropriator—I believe that has not appeared from the evidence yet, but it is undisputed—is a junior appropriator, and the amount that the defendants have

Testimony of W. C. Muldrow,

used for beneficial purposes is the test of his right so far as that particular point is concerned. While the defendant would not be permitted to change their works so as to make their use more wasteful than it was before the Government appropriated it, yet they cannot make him change it, as I understand.

The COURT: I think he is required to make a reasonable use of the water even as against a junior appropriator.

Mr. SMITH: But he is entitled, as we understand it, to maintain his same works.

The COURT: I think so; you may answer the question.

A. Read the question.

(Last question read).

A. Well, the land is irrigated according to the method that is generally known in irrigation practice as wild flooding.

Mr. SMITH: As what?

A. As wild flooding; that is, the water is simply turned out and allowed to flow in a general direction down across the land without any system of levees or regular furrow system.

Mr. BURR: If the Court please, I would like to read Section 6346 of the Code. (Mr. Burr then reads the section in question and argues the same to the Court).

The COURT: I don't care to consume time now. Try it on your own theory, and I will dispose of it according to mine.

Testimony of W. C. Muldrow.

Q. Mr. Muldrow, is there a run-off from Mr. Bennett's land during the irrigation season?

A. Well, Mr. Bennett's land lies in a coulee which is similar to the typical coulee of this country and slopes towards the center, and in the center there is a swamp of about fifteen acres or so, where the water stands in the irrigation season and runs off there and through a drain down at the lower end.

Q. Have you measured the amount of run-off from that lower end?

A. I did at one time measure the drainage from that swamp.

Q. At what figure did it compute?

A. It run a quarter of a cubic foot per second—twenty-four hundredths to be exact.

Q. Is Mr. Bennett's land properly leveled for irrigation in your judgment?

A. Its grades are not at all bad considering ordinary practice.

Q. Did you ever put any levels on that land?

A. No, simply from observation.

Mr. BURR: I would like to reserve the privilege of calling Mr. Muldrow again.

CROSS EXAMINATION.

By Mr. SMITH:

Q. Did I understand you to say that Mr. Bennett's land lies in a coulee?

A. You did.

Q. Would you explain to the Court as best you can the general contour of the country there; in other words,

Testimony of W. C. Muldrow.

make the Court see the land as nearly as you can, we will say from the Government reservoir clear down to Mr. Bennett's land.

A. Well, the Government reservoir is on Salmon creek, to the north, about twelve miles, I should judge, from the head of Spring Coulee. The creek runs almost south, slightly southeast, and the Okonogan river and the Spring Coulee, so-called, branches off from the Salmon creek canyon to the west, and at one time formed an ancient channel of Salmon creek to a point on the Salmon river several miles south.

Q. That is, you think there was at one time—Salmon creek or Salmon river as we call it, ran through Mr. Bennett's place?

A. Possibly.

Q. Now this coulee, as we call it, is a deep narrow cut between the mountains, isn't it?

A. Yes.

Q. And that extends from the reservoir down to where the creek, which is from Spring Coulee copper, isn't it?

A. Yes.

Q. And the cut extends on through Spring Coulee?

A. Yes.

Q. Now, about how wide is this little valley lying between those mountains?

A. It averages about a quarter of a mile or more.

Q. You think it will average that much?

A. Well, it depends. If you consider the strip of irrigated land it won't, because at Mr. Bennett's place the

Testimony of W. C. Muldrow.

strip of irrigated land does not take up the whole coulee.

Q. Now from the reservoir down for some nine miles there is no valley at all, is there; the mountains come square to the creek?

A. There is a slight, a small quantity of land along in there at different points.

Q. I wanted to ask you this question, Mr. Muldrow, if Spring Coulee is not more properly a fissure than a coulee?

A. No, it is in an erosive channel cut out by glacial action just about the same as other coulees.

Q. Do you know whether bedrock has been found in Spring Coulee at any place?

A. No, I have no knowledge of that.

Q. Do you know of any tests having been made at any time to find bedrock?

A. No.

Q. Did the United States Government surveys make tests?

A. Not to my knowledge.

Q. Were you at Conconully when they were driving the sheet piling for the reservoir?

A. Oh, yes, up at the dam there was such tests made.

Q. Was there any bedrock found up there?

A. At the center of the dam—I don't know, I wasn't there at the time that they were making the tests, and I don't remember the results of it.

Q. Well, the first site of the dam was abandoned, was it not, on account of no bedrock?

A. Not on account of no bedrock, but on account of

Testimony of W. C. Muldrow.

the porous and broken nature of the bedrock on one side of the abutment of the dam.

Q. Did I understand you to say that you were there when the sheet piling was being driven?

A. No, I was not.

Q. Have you any knowledge as to whether or not when they were driving the sheet piling there old logs and timber was struck by the sheet piling sixty feet below the surface of the earth?

A. Well, the sheet piling only extended thirty feet.

Q. Is that all?

A. That is all.

D. Did you strike logs and timber down there?

A. Why, I heard it said that logs were struck underneath. I wasn't there during the time. I came there the season after the sheet piling was put in; mere hearsay.

Q. Now you were over at Mr. Bennett's several times last summer, were you not, Mr. Muldrow?

A. I was.

Q. Were you there in the month of June, you think, or July?

A. I was probably there—I don't know that I was down on his place during June and July. I was there in August.

Q. Were you over there some time in June, we will say when Mr. Bennett was not at home, when you had a talk with Mrs. Bennett?

A. I was there at one time—I don't know the date; I could find it for you from my notes.

Q. I don't expect you to do that; the best you can. You remember the occasion, do you not?

Testimony of W. C. Muldrow.

A. I remember of talking to Mrs. Bennett on two different occasions up there.

Q. Well, on either of those occasions did you make any measurements or estimate of the water that Mr. Bennett had in his ditch?

A. On one of those two occasions I did; I have already testified to that.

Q. And that was the one and sixty-four hundredths, was it?

A. It was.

Q. Now, a short time after that you were back again and had a talk with Mr. Bennett, were you not?

A. I was.

Q. And you went over his land to some extent?

A. Yes.

Q. Did he have about the same quantity of water in his ditch at that time?

A. I don't know, I presume—I haven't any idea; I didn't pay any attention to the ditch. I don't think Mr. Bennett was irrigating; he was cutting hay.

Q. He showed you his timothy hay, did he?

A. Yes.

Q. And did you find it pretty dry?

A. Why, there was no evidence of dryness down around the point where we were.

Q. What I want to get at is whether you did not find that his timothy grass was burning there for want of water?

A. Mr. Bennett showed me one spot of timothy that he showed me was burning. It was a spot that was never

Testimony of W. C. Muldrow.

cleared of gravel and stone, where he run water over the uncultivated ground.

Q. Was it burning as you saw it there?

A. There was some timothy that was burning; that is, it showed lack of nourishment on account of either lack of water or lack of nourishment in the soil or something.

Q. And he invited you, didn't he, to come up and see his grain also at that time?

A. Why, I cannot—I presume he did, I am not quite sure about it.

Q. Don't you remember that he told you that it was burning also and asked you to come up and see if it was not?

A. Mr. Bennett and I had a considerable amount of conversation just at that time, and I am unable to recall the exact—

Q. Anyway, you didn't go with him, did you?

A. I don't think I did.

Q. Now, at the times you were over there to see Mr. Bennett about his water you and he were having some disputes, I believe, weren't you, about his use of the water?

A. There was no dispute on my part.

Q. Well, in other words, you closed down his head-gate and he would raise it again?

A. Yes.

Q. Now, the water of Spring Coulee or that creek had never been adjudicated, had they?

A. No.

Testimony of W. C. Muldrow.

Q. And Mr. Bennett's right to that water had never been adjudicated, to your knowledge?

A. Not to my knowledge.

Q. And yet you were shutting him down?

A. Yes, I was shutting him down.

Q. Yes?

A. I was closing the headgate to a certain extent.

Q. Who told you, Mr. Muldrow, that you had any right to close down that headgate when the waters of the creek had not been adjudicated?

The COURT: That question does not enter into this case.

Mr. SMITH: All right.

Q. You had just been over Mr. Bennett's land, I believe, just walked over it?

A. Yes, two or three or four times.

Q. Never dug in the ground to see what was in there?

A. No.

Q. Now, the duty of water, Mr. Muldrow, depends entirely, does it not, on the individual tract of land on which it is being used?

A. Not entirely. To a certain extent it does.

Q. Well, to a very large extent?

A. It makes a pretty good percentage, I would imagine.

Q. Up in our county, there, Mr. Muldrow, the land is very patchy, isn't it, and when we speak of it as to its adaptability for irrigation, some places it will take an immense amount of water and in other places right next to it it won't take near so much?

Testimony of W. C. Muldrow.

A. That is true.

Q. And from using water on one tract of land you could hardly tell how much water would be required to use on even the adjoining tract in that country?

A. Why, it would give you a pretty fair idea; it would give you the best idea you could have under the circumstances, except by actually using water on that tract.

Q. Now, the Government project there is a fruit proposition, isn't it, Mr. Muldrow?

A. Fruit is the largest industry, yes.

Q. Well, that is almost exclusive, isn't it?

A. It will be exclusive, probably, some day.

Q. Now, alfalfa and hay always require more water to irrigate it than fruit, doesn't it?

A. That is true, on land of similar character.

Q. Yes, I mean if you put the two on the same tract, for instance?

A. Yes, sir.

Q. What is the extent of the examinations you ever made of this Spring Coulee ditch from the intake at Salmon Creek down to Mr. Bennett's lands?

A. By the intake at Salmon Creek I meant the spill-way where the water is regulated.

Q. There at the Gardiner place?

A. And at the Gardiner place, that is the point at which the water is measured and has always been measured.

Q. Well, the intake of the ditch is up at the Maloney place, up above?

Testimony of W. C. Muldrow.

A. Yes, I have been up there a number of times.

Q. What?

A. I have been there a number of times.

Q. Are you acquainted with the ditch from the intake up on the Maloney place down to the spillway?

A. Yes.

Q. Did you ever go over that with a view of examining the ditch?

A. Not rigidly, no; walked up and down it several times; I know it is shown correct.

Q. Just walking along the bank?

A. Yes.

Q. Now, from the spillway down to Mr. Bennett's place, what has been the extent of your examination of the ditch?

A. I followed its general course only once, its full course, but at that time with a view to studying its character with regard to seepage and making measurements to determine the amount of seepage.

Q. What did you do to discover its least—or the least water in transportation through that ditch?

A. I simply measured the quantity of water that was coming into it and measured each quantity of water that went out of it, and measured the quantity of water remaining in it at intervals.

Q. You made no examination of the soil over which the ditch was running?

A. Yes, I did.

Q. That is, down in the ditch, I mean?

A. I examined the bed of the ditch to a certain ex-

Testimony of W. C. Muldrow.

tent all along, because our object is to determine the amount of seepage and the points where the seepage was occurring, as far as possible.

Q. That was from the spillway down to Mr. Bennett's land?

A. Yes.

Q. And how far was that, did you say?

A. It is approximately two miles. I would not say now because I have not paid any attention to those old notes and do not remember.

The COURT: How far is it from the spillway to the river?

A. Oh, it is about half or three-quarters of a mile.

Mr. SMITH: I think if the Court would care to have it we might be able to give you a little better idea from the diagram that I might prepare as to the way that situation exists.

Mr. CAIN: We have a map here. (Handing same to Mr. Smith).

Mr. SMITH: Probably this is the very thing we want. Have you any objections if I hand this to the Court?

The COURT: I just want to know in a general way how long the ditches were. (Court examines the said map).

Mr. SMITH: I think that is all for the time being, your honor. We will probably wish to ask him another question later on.

Testimony of W. C. Muldrow.

RE-DIRECT EXAMINATION.

By Mr. BURR:

Q. Mr. Muldrow, you testified in regard to the amount of water Mr. Bennett was receiving when you measured; how much a supply of water would that make to Mr. Bennett's ranch, measured in acre feet?

A. Well, that depends on the exact acreage of land to which he was applying it.

Q. Estimated at fifty acres, how much would it make, fifty acres?

A. That would depend also on the length of the irrigation season, those two factors.

Q. What is the irrigating season in that country?

A. About four months.

Q. Figuring the irrigation season at four months and the acreage at fifty, how much would the water that Mr. Bennett was receiving make in acre feet?

Mr. SMITH: I believe, your honer, that we will object to that question. If I remember the testimony it is a false estimate. I do not remember the witness saying anything about fifty acres; I think he said sixty.

Mr. CAIN: He said about fifty; he didn't know.

The COURT: He has a right to lay his foundation and prove it by other witnesses if he desires.

Mr. SMITH: Yes, for that purpose.

Mr. BURR: I intended to examine another witness first and lay the foundation for it.

A. Practically eight acre feet.

Q. Do you regard eight acre feet as an excessive supply of water?

Testimony of W. C. Muldrow.

A. Well, it would be so considered.

Q. Do you consider it so?

A. I do, under ordinary conditions.

The COURT: Does this eight acre feet mean at the land or above the land?

A. At the land.

Mr. BURR: Q. You testified to the amount of water flowing in that ditch; was that at the headgate or this spillway?

A. At this spillway. There is always more water carried through the ditch than is used in the section from the headgate to the spillway, and then they turn back into the creek the amount that they don't want to come down at this point.

RE-CROSS-EXAMINATION.

By Mr. SMITH:

Q. Mr. Muldrow, on the day that you measured this water on Mr. Bennett's place, was he using the water?

A. The water was turned off on his place. Mr. Bennett, I believe, was in town, and no one was apparently using it.

Q. Don't you know that Mr. Bennett was not irrigating at all that day, and that Mr. Heizman was using all the water?

A. Oh, Mr. Heizman was not.

Q. Beg pardon?

A. Mr. Heizman was not using the water. The water was coming on Mr. Bennett's place, whether he was irrigating or not, because it was not going through on Mr. Heizman's place.

Testimony of W. C. Muldrow.

Q. But Mr. Bennett was not home that day?

A. No.

Mr. SMITH: Mark this for identification.

Thereupon said paper was marked Defendant's Exhibit 1 for identification.

Q. Mr. Muldrow, I hand you a newspaper clipping, marked for identification, Defendant's Exhibit No. 1, and I will ask you if that is a newspaper advertisement that you carry in at least one of the newspapers of Okanogan County?

A. It is.

Mr. SMITH: We wish to introduce it later on, or now just as well.

The COURT: What is the advertisement?

Mr. SMITH: Shall I read it, your honor?

The COURT: Yes.

(Mr. Smith reads the newspaper clipping, Defendant's Exhibit No. 1).

Mr. SMITH: We offer it in evidence as Defendant's exhibit 1.

The COURT: It will be received.

Thereupon said paper was admitted in evidence, and marked Defendant's exhibit No. 1, and is made a part hereof.

RE-RE-DIRECT EXAMINATION.

By Mr. BURR:

Q. Can water be as economically used without supervision as with?

A. I would naturally presume not.

Mr. BURR: That will do.

Witness excused.

Testimony of Ferdinand Bonstedt.

FERDINAND BONSTEDT, a witness called and sworn on behalf of the Government, testified as follows:

DIRECT EXAMINATION.

By Mr. BURR:

Q. Will you state your full name, Mr. Bonstedt?

A. Ferdinand Bonstedt.

Q. What is your profession.

A. Civil engineering.

Q. Will you state briefly the experience that you have had in that profession with regard to irrigation?

A. I have been engaged at it for nine years.

Q. Where, Mr. Bonstedt?

A. Nine and a half years—in the arid areas of the United States.

Q. Were you ever officially connected with the United States Reclamation Service?

A. Yes, sir.

Q. Where?

A. Washington, Nevada, Oklahoma.

Q. How long and where in the State of Washington?

A. Since March, 1906.

Q. Where?

A. At Okanogan, Okanogan County.

Q. In what capacity, Mr. Bonstedt?

A. Engineer in charge of construction work and project engineer on the Okanogan Project.

Q. Have you been in charge, and if so, how long, of the operation of the Okanogan Project in the distribution of water for irrigation purposes?

Testimony of Ferdinand Bonstedt.

A. For three years.

Q. Are you so connected at present?

A. No, sir.

Q. When did you cease your connection?

A. About the middle of March, this year.

Q. Are you familiar, Mr. Bonstedt, with the Bennett ranch, the ranch of the defendant, I should say?

A. I visited it quite frequently.

Q. Will you describe the location of that property in regard to the Salmon River, or is that sufficiently covered—I think that is sufficiently covered——

The COURT: Colored in red there on the map, I think that is sufficiently covered.

Mr. BURR: Yes, I think so.

Q. Will you describe the topography of the defendants' property with regard to local conditions?

A. You refer to the irrigable land, I suppose?

Q. The irrigable land, yes, sir.

A. It is a body of land about a mile long and varying from fifty to five hundred feet wide; probably a little wider than that in some points—seven hundred feet.

Q. What is the land overhanging that property?

A. It lies in a valley with quite steep hills on both sides.

Q. Is there in your judgment a natural run-off and seepage from these coulee sides, canyon sides?

A. Yes, sir, I think there is a seepage from those sides.

Q. Is there any question about it?

A. I don't think so.

Testimony of Ferdinand Bonstedt.

Q. Are there springs throughout that coulee?

A. I know of one, a quite large spring—oh, I know of a number, yes, three—four.

Q. Is Mr. Bennett's land with regard to the necessary supply of water from the stream normal, or more or less, in its requirements than the average land of the Okanogan country, in your judgment?

A. In my judgment it requires less water to irrigate that land and I might say any land on the Okanogan Project or country.

Q. In connection with your work in charge of the operation and the distribution of water, have you been an observer of the amount of water needed upon the various lands in the Okanogan Valley?

A. Yes, sir.

Q. What have you done in the way of observation; will you describe a little bit more fully?

A. In doing my work up there I kept records of amounts of water that went on different tracts, various tracts, by means of weirs, measuring devices.

Q. Will you tell the Court briefly the method employed on that project of the measurement of water?

The COURT: I don't care about that.

A. They are measured on the project proper—that is, the lands——

Q. The Court says he does not care about that. Your method is in accordance with the approved scientific knowledge in the measurement of water. Is it, or is it not?

A. On the project, yes.

Testimony of Ferdinand Bonstedt.

Q. And what is the duty of water in the Okanogan country for new lands?

Mr. SMITH: We object to that question, your honor, as too general. It should be confined to the land in controversy.

Mr. BURR: I think in his answer he will bring out that distinction.

The COURT: There are two questions involved in this suit. One is the number of acres irrigated up there, and the other is the amount of water necessary to irrigate it. I think possibly some Okanogan farmers who have been engaged in that business could enlighten the Court on that subject. But you may proceed. (Last question read).

A. Why, the Government has placed it at two and a half acre feet and——

Mr. SMITH: We move to strike that answer as not responsive.

The COURT: I will not consider it.

Q. The answer was not responsive, Mr. Bonstedt, exactly. Will you tell the duty of water on new lands irrespective of what the Government has placed it at, what water is necessary on new lands in that project?

A. It would be necessary to divide those lands into two grades before I could state what in my opinion it requires.

Q. Well, state the two grades and give answer to each.

A. On volcanic ash soil for orchards I would place it at a foot and a half; for forage I would place it at two and a half acre feet.

Testimony of Ferdinand Bonstedt.

Q. For forage crop?

A. Yes. On the sandy land I would say about two acre feet for orchard land and possibly four and a half for forage crop.

Q. Of which character of soil is the land of this defendant?

A. I would class them as a volcanic ash soil.

Q. Now, upon old land what is the necessary amount of water for fruit?

Mr. SMITH: I believe the witness has answered that, your honor.

Mr. BURR: I asked him on new lands. I am now asking him on old.

The COURT: This defendant is not engaged in the fruit business.

Mr. SMITH: No.

Mr. BURR: He alleged in his answer he has an orchard there.

Mr. SMITH: He has a family orchard.

The COURT: I suppose a family orchard is very small, I don't know.

Mr. SMITH: Oh, yes, it is not an acre, or just about an acre.

Mr. BURR: If the Court please, I would like to say at this time, in order to make this relevant, that I would like to secure a decree as to the duty of water on that ranch for two different crops. The land will undoubtedly after some time come into apples. In fact, the defendant is intending to sell it for that purpose as soon as may be, and I would like to get a decree as to the

Testimony of Ferdinand Bonstedt.

duty of water for alfalfa and forage crops, and the duty of the water when it shall come into fruits; and therefore that question I would like to make relevant in that connection.

The COURT: I will not enter any such question. I will determine his rights at the present time.

Mr. BURR: I would like to take an exception.

Q. What is the duty of water on old lands for forage crops in the Okanogan country?

A. In my opinion it is about two and a half acre feet.

Q. On volcanic ash soils or on sandy soils or both?

The COURT: He answered that question. He said four and a half on sandy soil.

Mr. BURR: I thought he was talking about new lands at that time. My question was as to new lands in that connection.

A. I would state that I don't know of very little old lands that are sandy; practically all the old lands are what is known as volcanic ash soil.

Q. What is the custom of the country in regard to the duty of water?

Mr. SMITH: We object to that, your honor, as being immaterial.

The COURT: He may answer, if there is any custom.

A. I don't know.

The COURT: I judge from the testimony here that there is not.

Mr. SMITH: That is what the witness said.

The COURT: You are trying to base it on Government contract.

Testimony of Ferdinand Bonstedt.

Mr. BURR: If your honor please, we are prepared to show that all of the old and new lands of the project, those having vested water rights before the Government, and those having contracts from the Government are——

The COURT: Do you think you can establish custom by contract? Isn't the custom the very opposite of contract?

Mr. BURR: It does not seem to me so.

The COURT: That is my understanding of the law, that custom is never based on contract. The very word shows the contrary.

Mr. BURR: Q. Outside of the Government contract, Mr. Bonstedt, are there other contracts in the vicinity of the defendants' property——

Mr. SMITH: That is objected to as immaterial.

A. (Continuing)—upon the duty of water?

The COURT: You may answer.

A. Yes, I know of one.

Q. What is the duty under that contract, that series of contracts?

A. That calls for three-quarters of an inch per acre.

The COURT: What would that amount to in cubic feet, three-quarters of an inch, under pressure, you mean?

A. Yes, sir.

The COURT: Under a six or four inch head?

A. It does not state; it simply says three-quarters inch per acre; I don't know what the pressure is.

Mr. BURR: Q. How deep is the water cable under the defendants' irrigated land, if you know?

Testimony of Ferdinand Bonstedt.

A. I don't know.

Q. Is there a well at the lower end of the property?

A. Adjoining the defendants' property, yes.

Q. At the lower end?

A. Yes, sir.

Q. How deep is the water from the surface in that well?

A. It is about seven and a half feet.

Q. From the surface of the ground?

A. From the surface of the ground.

The COURT: Submerged?

A. Well, I measured it about some time in January, and it was seven and a half feet, and I measured it on May 10th and it measured about eight feet.

Q. Is that water cable closer than the ordinary lands of the Okanogan country that are under irrigation?

A. I don't know where that water plane is.

Mr. SMITH: I object to that, your honor; that is a pretty hard question.

Q. Will you describe the lands of the defendant with regard to conditions of water cable as shown by the marsh existing on his land?

A. The marsh—I should say the marsh was about fifteen feet below the highest point of his land, and that about a third of his area, that the lands lie four feet above the marsh.

Q. Does the existence of that marsh indicate anything with regard to the amount of water necessary on the defendants' land? If so, what?

A. In my opinion it would require less water to irri-

Testimony of Ferdinand Bonstedt.

gate that land with that marsh—the water plane being about four feet below the surface of the land.

Q. Is that marsh increasing in size or diminishing or stationary?

A. I don't know definitely, but I think that it is increasing a little.

Q. Does water stand there summer and winter

A. Well, for several months this—in the past year it was dry.

Q. Do you know whether that is normal during that season of the year

A. I have known it to be dry several other seasons, that is, dry enough so that you could traverse it without getting your feet wet.

Q. Will you state the condition as to cultivation on the defendants' property, whether or not it is in proper shape for economical irrigation?

A. In my opinion it is not in shape for high duty of water.

Q. Is it in average shape for the Okanogan country?

A. Yes, sir.

Q. The old time water rights?

A. Yes, sir.

Q. Or both?

A. It is in average shape for the method used in that country for irrigation.

Q. Is it as good as Mr. Carpenter's place?

A. Which Carpenter?

Q. I will withdraw that question with the Court's permission. Mr. Bonstedt, upon what are the Government water rights based in the Okanogan country?

Testimony of Ferdinand Bonstedt.

The COURT: Cover the most possible ground with the least possible water, are they not?

The WITNESS: Beg pardon?

The COURT: To cover the most possible ground with the least possible water?

The WITNESS: No. They are based upon a normal flow of the Salmon River, being thirty thousand acre feet.

The COURT: And you desire to cover that many acres with it?

A. No, a third of it, ten thousand, making the duty three acre feet of the diversion point.

Mr. BURR: The appropriation of the United States, and the compliance with the law, as I understand it, is admitted by the answer.

The COURT: Denied on information and belief, I believe. I don't know whether that amounts to a denial or not. I believe there is an averment afterwards as to information and belief. There is a denial on information and belief, so I think one destroys the other.

Mr. SMITH: We have admitted that they have built works there and that sort of thing, but our intention was that what they have taken in the way of appropriation we do not know.

Mr. BURR: I think they admitted paragraph four of the complaint, down to the point of the placing to beneficial use.

Mr. SMITH: Well, your honor, we do not wish to be technical here. We understand they have built their works and appropriated water, and probably all of the

Testimony of Ferdinand Bonstedt.

unappropriated water. That is too nice a point to litigate here. We simply want to litigate the question of what water we are entitled to use.

The COURT: With that understanding it is not necessary to prove it.

Mr. BURR: We are prepared to offer copies of the documents, if they are desired.

The COURT: I say in view of counsel's admission it is not necessary to prove it.

Mr. BURR: Q. Mr. Bonstedt, what was the condition of the run-off in the year 1911 for the Okanogan Project?

A. The smallest that it has—since records have been kept.

Q. Did the Government have enough to water?

A. No.

Q. Are you familiar with the kind of irrigated land that the defendant has?

A. I made a survey of it.

Q. Have the map of the irrigated land here?

A. Yes, sir.

Mr. BURR: I would like to introduce the map of the property.

Mr. SMITH: I object to it, your honor, at this time; no proper foundation.

Mr. BURR: Q. Was that survey, Mr. Bonstedt, made by one of the Government engineers?

A. It was made by myself and another party, who acted as rodman.

Mr. BURR: We now would like to offer it.

Testimony of Ferdinand Bonstedt.

Mr. SMITH: We renew the objection, your honor.

The COURT: You prepared the map, did you?

The WITNESS: Yes, sir.

The COURT: That is in accordance with your survey?

A. Yes, sir.

The COURT: Objection overruled.

Thereupon said paper was admitted in evidence and marked Government's Exhibit No. 2.

Q. Where are the boundaries of Mr. Bennett's property—that is admitted in your pleadings?

A. Shown here by the solid black line.

Q. What is the area of the land to the west that is shown there as being under cultivation?

The COURT: Probably you had better explain what these lines on the map mean first.

A. The green line shows the outline of the area to which water has been applied.

The COURT: That is the green line here.

A. The green line.

The COURT: And this line here?

A. Yes, sir. This shows the outline of the swamp.

The COURT: Do you exclude the swamp in that computation?

A. Excluded the swamp.

The COURT: What is the area without the swamp?

A. 14.8 acres.

The COURT: Excluding the swamp, I say, what is the area?

A. 50.9 acres, and toward the Reed Creek 3.3 acres.

Testimony of Ferdinand Bonstedt.

The COURT: Are both of these involved here?

Mr. BURR: Not the Reed Creek, no, sir.

The COURT: Practically fifty-one acres, then?

The WITNESS: Yes, sir.

Q. The land shown upon that plat lying to the west of the land, marked 14.8 acres irrigated, what is the nature of that land?

A. Below the ditch you refer to?

Q. Right here (indicating).

A. That is very rocky.

Q. Was that irrigated at the time when you made that survey which resulted in that map?

A. I don't believe it was.

Q. What were the indications as to cultivation or the lack of it, and irrigation, or the lack of it?

A. It showed no indication that it had been irrigated or hay had been cut from it.

Q. Just what was the condition as to soil?

A. It was parched, burned. This survey was made in October, and the foliage was dead.

Q. No cultivated crop showing?

A. No.

Q. It is not arable land, you say?

A. I say it is not plow land; I don't think it could be plowed.

Q. Why not?

A. It is covered with large boulders.

Q. When did you make that survey?

A. Made in October, 1908.

Q. What is the precipitation in Okanogan County?

Testimony of Ferdinand Bonstedt.

A. At Conconully the normal is about seventeen inches.

Q. How much?

A. Seventeen inches.

Q. How much at Omak, on the project?

A. I think it is twelve—yes, we will call it twelve.

Q. What time in the year does that precipitation largely come?

A. During the winter months.

Q. Is there rainfall during May as a rule?

A. Yes; have showers.

Q. Is there rain during September and October as a rule?

A. Yes, generally.

Q. Do you need water during the month of September in the Okanogan country in order to raise alfalfa?

A. In my opinion I do not believe you do.

Q. Do you need it during April?

A. I think not.

Q. Are the farmers actually raising three crops of alfalfa in the Okanogan country without receiving water in April and September?

A. Well, they all apply it during those months.

Q. What is that?

A. They generally apply water during those months. I would like to modify that, during the first—during the last half of April and the first half of September.

Q. Are they raising alfalfa in some portions of the new lands on the project without receiving water during those months, April and September?

Testimony of Ferdinand Bonstedt.

A. Has been some raised.

Q. Well, do they need it during April and September for three crops of alfalfa?

A. My opinion is that they do not.

Q. The old lands on the project, the old alfalfa lands, will require less rather than more water than new lands will, will they not?

A. Yes.

Q. Do you deliver any water whatsoever to the new lands of the project during April and September?

A. We did last year.

Q. How long?

A. They watered during April, the last half of April, last year.

Q. Was water delivered this year during April?

A. No.

Q. When did water delivery this year begin?

A. I don't believe that they began—yes, they delivered, I think, three days, so Mr. Castile told me.

Q. Well, we will prove that by Mr. Castile. How late does the snow, as a rule, lie on the lands of the project?

The COURT: If they only have eleven inches of rainfall it does not lie all summer, that is certain.

Q. They have a pretty late snow lying on the ground?

A. March first.

Q. Will the lands of the defendants have snow longer or shorter—I mean later, or not, than the other lands on that project?

Testimony of Ferdinand Bonstedt.

A. Have it later.

Q. Is the precipitation on the lands of the defendant in the Spring Coulee Valley greater or less than the average country, the average on the project?

A. I think it is a little more normally.

Q. Why?

A. It is a little higher, closer to Conconully. It indicated that as we approach the mountain the precipitation seems to increase.

Q. Is there more timber up in that district than there is on the average lands on the project, or less?

A. There is more.

Q. What does that show in regard to irrigation and length of seasons?

A. I think that has a tendency to delay the melting of the snow.

Mr. Burr: Take the witness.

CROSS-EXAMINATION.

By Mr. SMITH:

Q. Do you know why water delivery has not commenced up there this year so far?

A. On account of the rain.

Q. Yes, we have had the heaviest rains this spring that have been there in years, haven't we, more of it?

A. I believe that they had years like it before.

Q. In your time and mine there?

A. In my time.

Q. Well, this is a very high year, though, isn't it?

A. I think it is considerably above normal.

Q. And last year was a very, very low year, wasn't it?

Testimony of Ferdinand Bonstedt.

A. Precipitation?

Q. Well, water was scarce last year?

A. Precipitation was—there was only one year in the eleven years that the precipitation has been greater——

Q. Than last year?

A. Than last year.

Q. It wasn't only the Government that was short of water; we were all short, weren't we, last year, generally speaking?

A. It goes to show that the precipitation—other things than precipitation affect the turn-off.

Q. I am just trying to get at the fact of it. Everybody was short of water, generally speaking, last year?

A. Project lands were, yes, sir.

Q. And others, so far as you know—so far as your knowledge goes, what is the fact, Mr. Bonstedt?

A. Oh, all the old ranchers, yes.

Q. And the new ones, too? I am trying to get at the fact, Mr. Bonstedt, whether or not last year was a very dry year every place up there, not only down on the project.

A. That is true.

Q. Now, you surveyed these lands, I believe; when did you make that survey?

A. October, 1908.

Q. It was a Government survey, was it; that is, made under the direction of the Government?

A. Yes.

Testimony of Ferdinand Bonstedt.

Q. How many surveys have the Government made of Mr. Bennett's lands?

A. Three.

Q. Have you the results of the other two?

A. I have no map.

Q. Well, we would be willing to dispense with the map if we could get the results.

A. I think I know the results, yes.

Q. Well, now, there are not two of them alike, are they? Did not get the same acres either time?

A. Yes, two of them agreed approximately.

Q. One survey made it about twenty-five acres, didn't it?

A. So I understand.

Q. Well, you have got the notes on that, haven't you?

A. Not here.

Q. Who made that survey for the Government?

A. I think it was made by Mr. O'Keefe and a party by the name of Maloney.

Q. They were reclamation engineers?

A. They were employed by the reclamation service.

Q. Now, the next survey that was made increased the area quite a bit; how much did they make it, the second survey?

A. Fifty acres.

Q. That much?

A. Yes, sir.

Q. Have you got the notes on the second survey here?

Testimony of Ferdinand Bonstedt.

A. No, sir.

Q. Well, what was the necessity—why was the third made?

A. To convince myself of what that area was.

Q. I don't want you to injure your irrigation project up there, but I understood you to say that you had ten thousand acres under the project; is that correct?

A. Yes, sir.

Q. I have been under the impression that it was eight; eight thousand acres is all you claim you can irrigate; am I correct or not?

A. As new land. I am counting old lands as part of the project.

Q. Old water?

A. Old water rights, yes, sir.

Q. I understood you to say that Mr. Bennett's place was not in very good shape for cultivation; was that right? Did I understand you correctly?

A. I stated that it was in as good shape as any lands up there.

Q. Oh, yes; now, Mr. Bonstedt, how long have you lived in the vicinity of Mr. Bennett's place?

A. Six years.

Q. Now, you have a ranch in that coulee some place, haven't you?

A. No, I have not.

Q. Mr. Bennett is one of the very best farmers in that country, isn't he?

A. He is considered a very good farmer.

Q. Now, isn't it a fact that he and Mr. Maloney, his

Testimony of Ferdinand Bonstedt.

neighbor above him, where this Spring Coulee ditch is taken out, are regarded as the best two farmers in all Spring Coulee; raise bigger crops?

A. I have heard Mr. Maloney's mentioned, but I don't know as I have——

Q. Well, haven't you mentioned it yourself, Mr. Bonstedt?

A. I might have.

Q. You have never seen any indications on Mr. Bennett's crops of too much water, have you?

A. I never saw them suffer.

Q. Either with too much or not enough; you regard him a good farmer, don't you?

A. I cannot say that I ever saw them suffer.

Q. You are not meeting me quite square as I would like you to, Mr. Bonstedt; I want to get at it both ways. You say you have not seen them suffer for water. I want to find whether you saw anything that would indicate that they were suffering from too much water or not enough, either one?

A. I would state that you probably could point out points there that too much water alkali'd that soil.

Q. I know that is the supposition, but I am asking you whether you saw anything that you can recall now that indicated too much water?

A. Those alkali spots, in my opinion, might be caused through a surplus of water to have been applied.

Q. Alkali is a very general product all through our country up there, alkali spots all through the ground?

A. Principally adjoining the hills, yes.

Testimony of Ferdinand Bonstedt.

Q. You never dug into Mr. Bennett's ground to find out what is under there, did you?

A. No, sir.

Q. Never made any examination of the sub-surface?

A. No, sir.

Q. Or sub-soil?

A. No, sir.

Q. And the Government never made any, to your knowledge?

A. Not to my knowledge.

Q. I understood you to say you are not with the Government now. You just have a lay-off, haven't you?

A. I don't know what my status is exactly. I asked for a year's lay-off or furlough, and it has not been granted yet.

Q. Are you on half pay or something; aren't you drawing pay yet from the Government?

A. No, sir.

Q. Now, this well down below Mr. Bennett's place, that is on the Heizman place, isn't it?

A. Yes, sir.

Q. And that well is right close to Mr. Bennett's south line, isn't it?

A. Within four or five hundred feet.

Q. Within four or five hundred feet. Now, how deep is that well?

A. It is about eighth feet and a half.

Q. No, I mean to the bottom of the well.

A. Oh, I never measured the bottom.

Q. Did you ever notice the kind of soil or whatever -

Testimony of Ferdinand Bonstedt.

it is that was taken out of the well, while it was being dug?

A. Yes.

Q. Did you ever see any snail shells and mussel shells, or do you know that that is what they encountered down there?

A. I did not examine the soil as closely as that.

Q. Now, you measured it in June of what year and found seven and a half feet?

A. I don't remember the exact date. It might have been December, 1910, or the first of the year.

Q. Now, then, by May the water had sunk half a foot in it?

A. Yes, sir.

Q. And irrigation had been going on on the Bennett place up to that time, up to May, hadn't it?

A. No.

Q. This year, was it May of this year?

A. May of this year?

Q. In 1910, was it, that you found it was seven and a half feet down to the water, or 1911?

A. 1911. Either December, 1911, or January, 1912.

Q. Now, I understand. But in May of this year, after such irrigation as has been going on in the coulee there by Mr. Bennett and everybody else, and after all of these excessively heavy rains that we have been having, the water has gone down a half a foot in the well; is that correct?

A. This measurement I made, yes, from the time I measured it.

Testimony of Ferdinand Bonstedt.

Q. What was that well dug for?

A. I don't know.

Q. Haven't you heard what it was dug for?

A. No, I have never heard. I understood that Mr. Heizman was going to use it for a pumping proposition.

Q. Mr. Heizman is one of the old water users there in the coulee, isn't he?

A. Yes.

Q. He raises alfalfa?

A. Yes.

Q. And I believe he signed up for three acre feet, did he, with the Government?

A. Yes, sir.

Q. Now, Mr. Heizman since signing up with the Government has bought some fourteen acres of water from the Government to irrigate this same alfalfa that he was irrigating before, hasn't he?

A. Yes.

Q. And he has dug this well to pump out of besides, hasn't he?

A. I don't know whether he is going to pump from it.

Q. Well, that was your understanding?

A. Yes.

Q. You spoke of some project or ditch that was giving three-quarters of an inch to the acre; what project is that and where is it?

A. I am taking that from the records of the sale from the Munson ranch to the Cook ranch.

Q. The Munson ranch is just below the Heizman ranch in the Spring Coulee?

Testimony of Ferdinand Bonstedt.

A. Yes, sir.

Q. Three acre feet of water under our project up there is equivalent to how much miner's measure under a six inch pressure?

A. How is that?

The COURT: Fix the period.

Mr. SMITH: I said under our project up there.

A. Basing a miner's inch, or one second foot, fifty miner's inches, it would be practically a half inch, miner's inch.

Q. Are you using six or four pressure—fifty miner's inches under what pressure?

The COURT: Four?

A. I would have to look that up. I don't know whether the fifty miner's inches—what pressure that would be.

Q. Well, we will concede that to be four.

The COURT: My understanding is that it is four.

Mr. SMITH: Take it under six inch pressure—and we will concede that for general purposes to be forty?

A. Forty-one.

Q. Three acre feet under the Okanogan project is equivalent to how many miner's inches under a six inch pressure?

A. I think it is a half miner's inch, approximately, you know.

Q. Yes, approximately one-half of one miner's inch?

A. Yes.

Q. A little less, isn't it?

A. No, it is a little more.

Testimony of Ferdinand Bonstedt.

Q. A little more. Now, when you have given your estimate of the duty of water, you have used its highest duty, have you not, Mr. Bonstedt?

A. That is economical use, yes.

Q. And it contemplated use by an expert irrigator, too, doesn't it?

A. A party familiar with irrigating methods.

Q. Do you know Mr. Bert Jones, who lives up Spring Coulee a piece above Mr. Bennett?

A. I do.

Q. Did he ever work for you or under you?

A. He worked for this reclamation service.

Q. Have you talked with him any about the duty of water in that country?

A. I don't think so.

Q. I will ask you if you had a conversation with him in 1906 while you were surveying over at Mr. Hendrick's about the duty of water in the Okanogan country?

A. In 1906?

Q. Yes.

A. I don't recollect it.

Q. And I will ask you if in that conversation Mr. Jones asked you how much water it would require to irrigate in our country up there, and if you did not tell him in substance this language: "It takes seven acre feet in Nevada, and by God, I don't see why it won't take that much here, the soil being rocky and gravelly"?

A. Never remember that conversation.

Testimony of Ferdinand Bonstedt.

Q. That would not be exactly word for word, but as nearly as I can get it; anything similar to that?

A. I don't remember it.

Q. I ask you again if you had a conversation with him about two years ago at the Government's camp in regard to Mr. Bennett as a farmer, in which you said that you regarded Mr. Bennett and Mr. Maloney the best two farmers in Spring Coulee, or words to that effect?

A. I have—I might have said it; I don't remember it.

Q. Do you know a gentleman up there by the name of Victor Ravenal?

A. I do.

Q. Have you talked with him, about the duty of water?

A. I have.

Q. Now, this Okanogan project is a fruit proposition, isn't it?

A. It will be eventually.

Q. Well, that is what it is now?

A. Yes.

Q. And it takes a great deal more water for alfalfa and forage than it does for fruit?

A. Yes.

Q. As much again?

A. In some instances it does.

Q. Do you remember talking to Mr. Ravenal up at the Government headquarters about three years ago about the duty of water in the project?

Testimony of Ferdinand Bonstedt.

A. I have had a number of conversations with Mr. Ravenal.

Q. He is under the project now, isn't he?

A. Yes, sir.

Q. And he was raising some alfalfa at that time and is yet, I believe?

A. Yes.

Q. He made a complaint to you about not having enough water, didn't he; has several times?

A. I think so.

Q. And I will ask you if you did not tell him on various occasions that he would have to cut out his alfalfa, or words to that effect, that this was a fruit proposition?

A. I did, if the amount or quantity of water we were deliverinig was not sufficient.

Q. I am asking now if you were giving him what you agreed to give him, and with that understanding, and I want to ask you if you did not tell him he would have to cut out his alfalfa, that this was a fruit proposition, and not alfalfa?

A. I think I said that, but on a qualification that if he was not able to raise alfalfa at the quantity we were giving he would probably have to replace it and put it all in fruit.

Q. Now, Mr. Ravenal has one of the best ranches under the project, hasn't he; that is, so far as the soil being adapted for irrigation?

A. Yes.

Q. The soil is deep and good?

Testimony of Ferdinand Bonstedt.

A. A large percentage of it is.

Q. Now, you know Dr. Poge up there?

A. Yes.

Q. Dr. Poge of Poge Flat or Poge Prairie?

A. Yes.

(Thereupon an adjournment was taken until 2:00 o'clock p. m. of this day, at which time the trial was resumed, all parties present, the witness Bonstedt resuming the stand for further cross-examination).

Mr. SMITH: Q. Have you had some conversation with Dr. Poge or Senator Poge in regard to the duty of water on this project?

A. I had many conversations with Dr. Poge.

Q. Have you told him on one or more occasions that three acre feet was insufficient to irrigate alfalfa on his place?

A. I don't think so.

Q. Or under the project?

A. I don't think so.

Q. Not at any time or place?

A. Not to my knowledge.

Q. This project is built on Poge Prairie, a good part of it?

A. Called Poge Prairie.

Q. After Senator Poge?

A. Yes.

Q. In procuring this map, Government Exhibit 2, have you eliminated what you have referred to as the rocky land on Mr. Bennett's place?

A. Yes, sir.

Testimony of Ferdinand Bonstedt.

Q. That is not within your calculations?

A. Not within my calculations.

Q. In making that survey what method of surveying did you use?

A. We used a plane table.

Q. That is what is known as the Stedier system?

A. Stedier system.

Q. And were calculations made.

A. You would read by means of an Alidade, an instrument called an Alidade, that intercepts a certain place on the rod, which tells you the distance, reads the distance of the sight.

Q. Now, the Stedier system is not quite so accurate as actual chaining and calculations by latitude and departure, is it?

A. Not quite so accurate.

Mr. SMITH: That is all.

RE-DIRECT EXAMINATION.

By Mr. BURR:

Q. Mr. Bonstedt, you testified that the rocky land was not calculated on the map which has been introduced. You mean that it was not in the calculation of irrigated land, or not there at all?

A. It is not included in the area I gave as irrigable land.

Q. Do those figures in the extreme westerly part of the map indicate that rocky land, or do they not?

A. They indicate the rocky land.

Q. And the respective three figures that are given represent what?

Testimony of Ferdinand Bonstedt.

A. The areas of those respective pieces.

Q. The portion in the extreme southwesterly legal subdivision of the map, is that land claimed by Mr. Bennett, or what is the status of that land?

The COURT: That in green is the irrigable land, I understand?

The WITNESS: This 2.3 acres shown outside of Mr. Bennett's holdings.

Mr. BURR: What is the title of that land there?

A. I think that is still public land.

Q. How about this area in here at the extreme southerly portion of the map?

A. That is still—I think, that is still public land.

Q. Mr. Bennett does not, so far as you know, claim that?

The COURT: He does not claim anything outside of four subdivisions?

Mr. BURR: That is correct, yes.

Q. Now, you testified with regard to Mr. Bennett's place as to whether or not it was average land; irrespective of that question, is it in good condition for cultivation?

A. Not in first-class condition, no, sir; portions of it.

Q. Is it in condition so that it can be economically irrigated.

A. Portions of it are not.

Q. How much of it is not, would you say?

A. I would say all of it below the swamp, which would be approximately an area twenty or twenty-five acres.

Testimony of Ferdinand Bonstedt.

Q. Mr. Bennett's reputation as an irrigator and farmer has been put into evidence. Is his reputation one of economy, an economical farmer in the use of water, or not?

A. It is not.

Q. He is known as a man who uses an excessive amount of water generally throughout the valley?

A. Yes, sir.

Q. You merely mean, then, that he has a reputation of getting a good crop?

A. Yes, sir.

Q. Will you describe the conditions very briefly in regard to the run-off condition as to whether last year was abnormal particularly or not?

A. The run-off was particularly abnormal.

Q. And is the normal run-off such as to, in your judgment, give the Okanogan project more water than is expected to be used?

The COURT: I don't understand that the defendant questions the right of the Government to maintain the action. They only insist upon a certain amount of water there.

Mr. BURR: What I want is to lay the foundation in the testimony to the effect that we are damaged in the event of his using an excessive amount.

The COURT: I understand the defendant does not assert a right to use any more than he is entitled to, and he does not restrain you from using the balance.

Mr. BURR: All right, then.

Q. Have you observed the material that was taken

Testimony of Ferdinand Bonstedt.

out of the well near the lower end of Mr. Bennett's place just across the farm on the Heizman land, have you observed what was taken out of the soil?

A. I observed the soil, yes, sir.

Q. What is the character of that soil that was taken out of that well?

A. It all appeared to be good soil, the full depth of the well.

Q. Any coarse rock?

A. None whatever.

Q. When did Mr. Heizman sign that water right application that was referred to in the evidence this morning, approximately?

A. I cannot tell the date.

Q. Approximately when?

A. Some time last fall.

Q. The fourteen acres of additional water that was referred to was to irrigate what land?

A. It was to irrigate some old lands.

Q. Did he have a water right to it or not?

A. No, he had no water right to it.

Q. This was not then to supplement the water right, or the duty of the water which was conceded in the contract; was it or was it not?

A. Oh, no.

Mr. HINDMAN: I think that is immaterial, your honor.

The COURT: It was brought out on cross-examination, and I am rather inclined to think that it is.

Testimony of Ferdinand Bonstedt.

Q. Was that merely, then, to purchase water for land to which he had not any water right before?

A. Yes, sir.

Q. Has Mr. Heizman been receiving good crops under the duty of water conceded by contract of the Government?

A. He is getting very good returns from his land; I don't know what they are.

Q. He has the reputation as a successful farmer, or otherwise?

A. A successful farmer.

Q. Where is his land with reference to Mr. Bennett's?

A. Immediately south; abuts it on the south.

Q. Has he recently signed for additional water and a similar water duty right with the Government?

Mr. HINDMAN: I think it is immaterial what he signed for.

The COURT: I think it is immaterial, but it was brought out on cross-examination.

A. Yes.

Q. The question was asked you whether or not the duty of the water calculated by the Government for the Okonogan Project was not an exceedingly high duty of water, a small supply; does that have reference to the amount which is necessary for general farming?

A. Read the question.

(Last question read).

A. In my opinion I don't think the duty is excessively high compared with the California country.

Testimony of Calvin Castile.

Q. Is it high in comparison with the duty of water in other parts of the state, Mr. Bonstedt, the same season?

A. No.

Q. Is the duty of water, then, as was calculated conservative merely regarding efficiency or otherwise?

A. I think it is a conservative estimate.

Q. Is it your opinion that the defendant can irrigate his land in forage crops for with two and a half acre feet delivered at the land?

A. Yes, sir.

RE-CROSS-EXAMINATION.

By Mr. SMITH:

Q. This fourteen acres of water that Mr. Heizman bought some time ago was for land that he had under irrigation at the time the Government launched this project up there, isn't it?

A. Yes, sir.

Witness excused.

CALVIN CASTILE, a witness called and sworn on behalf of the Government, testified as follows:

DIRECT EXAMINATION.

By Mr. BURR:

Q. Your full name, Mr. Castile?

A. Calvin Castile.

Q. Your business?

A. Irrigation engineering.

Q. How long have you been in it?

A. Since 1903; June, 1903.

Testimony of Calvin Castile.

Q. How long have you been in the State of Washington?

A. All of that time in the State of Washington, except one winter that I spent in Arizona.

Q. Where in the State of Washington?

A. Principally in the Yakima Valley; for a short while in Okanogan.

Q. What part of the Yakima Valley?

A. On the Sunnyside project.

Q. In what capacity there?

A. First as engineer, then as kind of water master in looking after the measurements of water and keeping check on the patrolmen as to deliveries.

Q. What is your present position?

A. Graduate engineer on the Okanogan project.

Q. When did you first see the Okanogan country?

A. In 1903, I think, my first summer was spent on the Okanogan project making investigations.

Mr. BURR: Your honor, at this time I would like to offer testimony in regard to the duty of water in another section of the State of Washington, which we will prove required more rather than less amount of water.

Mr. SMITH: We resist the offer.

The COURT: I have no discretion about excluding testimony in cases of this kind, but as I have stated, if you are going to offer testimony as to all the arid land in this state and attempt to make a comparison we will never get through, and neither this court nor any other court will gain any light from it whatever; but you may offer the testimony if you desire.

Testimony of Calvin Castile.

Mr. BURR: I will refer to two questions very briefly on that, your honor.

Q. What is the duty of water on the Sunnyside unit of the Yakima project, in Yakima County, Washington, and is that duty successful?

A. The duty is three feet.

Q. Measured where?

A. Measured at the land, and is successful.

Q. Is it successful in raising alfalfa?

Mr. SMITH: May we make a general objection to the relevancy and competency of this?

The COURT: Yes.

Mr. SMITH: And will it be understood that it goes to all of this?

The COURT: Yes.

A. It is successful for the first year. I will say that the first year that the land is being seeded they are given more water, but after that the three acre feet is sufficient.

Q. Is the climate and the precipitation, rainfall, length of season such as to make a larger supply necessary, or a smaller supply as contrasted with the Okanogan project?

A. Read the question.

(Last question read).

A. It would require a larger amount of water on the Sunnyside than it will on the Okanogan.

Q. Sure of that?

A. I fell pretty positive.

Testimony of Calvin Castile.

Q. Now, Mr. Castile, in regard to the defendant's land, in what shape is it for economic irrigation?

A. I consider it in very poor shape.

Q. Will you describe it briefly to the Court.

A. It is alfalfa land, seeded to alfalfa, is checked. The method of flooding and the checks are run so that he runs his water down the steepest slopes, and the slopes are so steep that it must require considerable water under a long length of run to irrigate the land. The checks are also, some of them, of excessive lengths, some of them as much as a thousand or fourteen feet, although I believe this spring there has been some change made on them. On the parts below the swamp where the wild hay grows or the wild grass, it is very rough. The water escapes some of the high points there, I would say, a depth of a foot or a foot and a half in places, in the low parts. I suppose in the neighborhood of twenty acres are in that condition.

Q. How about the question of the waste water that escapes in that connection?

A. Why, I would say that it wasted in the neighborhood of a third of his water.

Q. Compared with the other lands both old and new of the project, would you say that the defendant's land was in average state of culture for irrigation or not?

A. Not as compared to the new land.

Q. How about the old?

A. Well, I believe in regard to those it classes with the worst of them.

Testimony of Calvin Castile.

Mr. SMITH: Classes up to——

A. Classes up with the worst.

Q. There is considerable variation, is there?

A. Yes, sir.

Q. It was put in the testimony this morning that the depth of the water table surface in the Heizman well was eight feet below the surface, if I recall correctly, or maybe ten. Tell the Court if you know when the Spring Coulee canal was first receiving water in the season?

A. I believe the water was turned into Spring Coulee down as far as Mr. Bennett's ranch anyway on the 7th. I was over there on the 6th and there was no water running in the Spring Coulee at that time, and Mr. Bennett told me that he was going to take water on the next afternoon, the 7th day of May.

Q. The variation might then be accounted in that manner that was referred to in the testimony?

A. Yes.

CROSS-EXAMINATION.

By Mr. SMITH:

Q. Mr. Castile, this spring there has been a great many rains up there, haven't there?

A. Yes, we have had several rains.

Q. It was very rainy for some two or three weeks past?

A. Well, off and on showers up to this time.

Q. And the water has been very high, hasn't it, in the mountain streams?

A. Why, I believe not. We had high water, but not excessive high water.

Testimony of Calvin Castile.

Q. Well, it has been high water season, hasn't it?

A. Yes.

Q. And notwithstanding this, this well was not as full as it was last year, is that correct?

A. I did not see that well last year.

Q. Oh, I beg your pardon. Do you know whether any current of water has ever been found in that well of water that has been the accumulation from last year when they quit digging?

A. I have not.

Q. Have you ever made any investigation of Mr. Bennett's land, that is, the soil?

A. No, I have never dug in it or anything of that kind.

Q. Now, Mr. Castile, will you just tell us, please, how you can tell the duty of water on a particular piece of ground unless you know what is under the ground, the sub-soil?

A. I was basing my opinion on the fact that that well had water in it, was near the surface, and again the fact that there is a swamp there on Mr. Bennett's land.

Q. Now, that is your opinion, isn't it, that that swamp has been there from time immemorial?

A. Yes, I have heard that.

Q. Now, the depth of the soil and the sub-soil have nearly all to do with the duty of the water for irrigation, doesn't it?

A. The length of the season, of course, and the amount of precipitation to a certain extent.

Testimony of Calvin Castile.

Q. But the nature and character of the soil——

A. That has something to do with it, yes.

Q. That has a lot to do with it, hasn't it?

The COURT: I think these are matters of common knowledge.

Mr. SMITH: I think so, too.

Q. Now, Mr. Castile, one other question, please. Gravelly soil or gravelly sub-soil requires more water than volcanic ash and clay, doesn't it?

A. It does unless you have the ground prepared so that you can rush the water over it.

Q. And you have to rush the water over it anyhow, don't you?

A. To get it wet, I presume, yes.

Q. Just simply like dropping through a sieve, is that right?

A. Yes, or down into the ground.

Q. Let me direct your attention to Government's Exhibit No. 2 and ask you to state if the Government has not a couple of weirs in one of those ditches shown on that exhibit?

A. There is a couple of weirs there, but I don't know who put them in.

Q. Would you indicate, please, on that exhibit about where those weirs are located?

A. There is one right here at the division.

Q. We understand it, but some one reading the record will never know what you mean by "right here."

A. There is one near the north end of Mr. Bennett's place.

Testimony of Calvin Castile.

Q. Make the letter "A" at the up weir and the letter "B" at the lower one.

(Witness does as requested).

Q. What were those weirs put in for?

A. I don't know.

Q. Have you ever made any use of them?

A. I have not.

Q. Since you have been project engineer?

A. I have not.

Q. Have you measured any water over them or made any tests from them?

A. I have not.

Q. You or anybody under you?

A. No, not to my knowledge.

Q. What is the distance from the upper to the lower weir?

A. Approximately a mile.

Q. You have no idea, then, as to the loss in transportation of water between those two weirs?

A. I have not.

RE-DIRECT EXAMINATION.

By Mr. BURR:

Q. Mr. Castile, did you ever hear of a marsh growing in a gravelly soil where there was a sub-soil that run off readily?

A. I have not.

Q. Is that an indication that the sub-soil is clay in that place?

Mr. SMITH: The counsel if awfully leading.

Testimony of B. E. Hendrick.

The COURT: Experience has taught me that a sieve will not hold water. You may pursue that course, however, gentlemen.

Q. For the purpose of having it on the records, will you give the water equivalents between miner's inches and a second foot briefly; I don't think that is on the record quite satisfactorily.

Mr. HINDMAN: I think that is immaterial, your honor, and I object to it as being immaterial.

The COURT: It will do no harm in the record.

Mr. BURR: The answer is very, very erroneous in comparing to second feet, with an inch to the acre for sixty-three acres. We are conceding all that they would ask on that matter.

Mr. CAIN: Mr. Smith says he will stipulate that.

Mr. SMITH: We will stipulate that fifty miner's inches under a four inch pressure constitutes a cubic foot, and that forty miner's inches under six inches of pressure constitutes a cubic foot.

Mr. BURR: The answer asks for two second feet a year; it seems to state that one inch for sixty-three acres is equivalent.

The COURT: It states in another place that forty inches of water under a six inch pressure is equivalent to a cubic foot.

Mr. BURR: Well, we have it stipulated.

Witness excused.

B. E. HENDRICK, a witness called and sworn on behalf of the Government, testified as follows:

Testimony of B. E. Hendrick.

DIRECT EXAMINATION.

By Mr. BURR:

Q. Your full name?

A. B. E. Hendrick.

Q. What is your business?

A. Farmer.

Q. How long have you been a farmer?

A. I have been farming myself about twenty years.

Q. How long have you been a farmer on irrigated land?

A. About four or five years.

Q. And where?

A. In the Okanogan.

Q. Where did you farm before that?

A. I farmed in Iowa and—well, I worked in Montana on a farm, and Colorado.

Q. How much land have you in the Okanogan country?

A. I have forty acres.

Q. How much of that is irrigable?

A. Thirty-six.

Q. Is your land exceptionally adaptable to alfalfa, would you say?

A. Not any more so than the surrounding land, I would think.

Q. When did you put it into alfalfa?

A. Two years ago this spring.

Q. How much of a crop did you get last year, Mr. Hendrick?

A. I got about thirty ton.

Testimony of B. E. Hendrick.

Q. How much land have you in alfalfa?

A. About six and a half acres.

Q. How much water did you use on that?

A. Well, I don't know in acre feet.

Q. How much land have you that is not in alfalfa?

A. Twenty-eight and a half—I think I have got twenty-nine and a half.

Q. How many crops did you get last year?

A. I got two full crops and the third crop wasn't very much. I did not have any water for it at all.

Q. You were short of water for the last crop?

A. Yes, sir.

Q. Do you consider that you can raise alfalfa with two and a half acre feet measured to you at the land?

Mr. HINDMAN: Objected to, your honor; he has not shown himself qualified.

The COURT: I will sustain the objection. He does not know how much he used himself.

Q. Based on the information that you have given as to how much water you were using, which I will introduce by a later witness, can you raise alfalfa with two and a half acre feet?

Mr. HINDMAN: I object to that, your honor.

Mr. BURR: If he assumes as correct the figures that he is given, which I will later prove.

The COURT: He says he does not know how much he used on the alfalfa, as I understand him.

A. I could not state how much I used, because I used it in connection with my orchard, and I didn't ever keep any account of it, and there wasn't any weirs to measure it out to me anyhow.

Testimony of B. E. Hendrick.

The COURT: I think your basis of comparison would be of very little value then.

Mr. BURR: He may give it for the best of his belief on the subject.

The COURT: He may give it and I will consider it for what it is worth.

A. In acre feet?

The COURT: Yes.

A. Well, I don't think that I used over two feet.

Q. On your alfalfa?

A. On my alfalfa.

The COURT: For the two crops?

A. For the two crops.

Q. With two and a half acre feet do you think that you could raise three crops?

A. Yes, sir.

Q. How many times did you irrigate?

A. I usually irrigated seven or eight times for alfalfa.

Q. Will you give as nearly as you can when you irrigated?

A. I should irrigate about the 25th of April and then—oh, two weeks—every two weeks after, say.

Q. How late in the fall did you irrigate last year?

A. July.

Q. Until when?

A. July.

Q. Do you recall what time in July?

The COURT: He irrigated until he ran out of water.

Testimony of B. E. Hendrick.

Mr. BURR: That is the idea, your honor, exactly.

Q. Are you familiar with the new lands on the project, generally?

A. Yes, sir.

Q. In your opinion can the new lands of the project be irrigated for alfalfa with two and a half acre feet?

Mr. HINDMAN: I object to it as incompetent and irrelevant.

The COURT: You may answer.

A. If used judiciously it could be.

Q. Have you any official connection, Mr. Hendrick, with the Water Users' Association?

A. Yes, sir; I am president of the association.

Q. How long have you been such.

A. Two years past.

Q. When the lands have been in alfalfa for a number of years, in your judgment will it be possible to get along with less water rather than more?

A. It would be my opinion that it would require more water the first year than it would later on.

Q. More water the third year than the tenth, in your judgment?

A. Well, possibly, I presume.

Mr. BURR: That will do. Take the witness.

CROSS-EXAMINATION.

By Mr. SMITH:

Q. Mr. Hendrick, your land is located on what is known as the second bench there, isn't it; that is, there is a bench of vast amount of irrigated land which is above your land?

Testimony of B. E. Hendrick.

A. I have some on both benches.

Q. Where have you got your alfalfa?

A. On both benches.

Q. On both benches?

A. Yes, sir; it is in two or three different tracts.

Q. And how many acres did you say you had?

A. About six and a half.

Q. When you come to irrigate that you just take whatever water you want and use it on your alfalfa and take it off again when you think you have got enough?

A. I wish I could.

Q. Well, isn't that the way you do it?

A. No, sir; I don't take all I want, because they never deliver it to me. My deliveries are made from two different weirs and in that way I cannot get—from the upper canal I have twenty-one acres and from the lower canal I have fifteen, and it makes two heads of water all the time.

Q. But when you irrigate your alfalfa you take all that you can get, don't you?

The COURT: Of your own water?

A. Practically all I can get of my own water, yes. I irrigate all I can of the alfalfa, and if I want I irrigate my trees, and if I don't I turn it off.

Q. The most of your land lies on this lower bench, doesn't it?

A. No, sir; the most of it lays on the upper bench. In fact, I have twenty-one acres up there and fifteen below.

Testimony of B. E. Hendrick.

Q. Have there been some sprngs break out on your land since the irrigation of that tract?

A. There is one broke out.

Q. You have some more springs, haven't you?

A. I had one spring there before the Government ever came in.

Q. Since the Government came in another one has broken out?

A. Yes, sir.

Q. And you get the benefit of that on your land?

A. No, sir, that is down twelve or fifteen feet in a canyon down below, not on my land.

Q. How far is this from your land?

A. About fifteen feet.

Q. Where has that spring come out on the second bench?

A. It comes out in a little canyon that runs into the south, that runs into the lower piece, probably twenty rods.

Q. Is that spring from surface water, or water that has seeped down through ground from above and bursted out?

A. It is probably from water that seeped down.

Q. And that has come down about fifty feet?

A. Well, it would be a little more than fifty feet from the water level on the upper bench.

Q. And when did the Government commence irrigating on the flat above?

A. I think it was four years ago.

Q. Anywheres near close to your land?

Testimony of B. E. Hendrick.

A. Well, they commenced on my land when they commenced irrigating along the land on the project.

Q. And when did this new spring break out?

A. That fall or the next spring.

Q. The same fall that the Government commenced or the next spring?

A. Well, it might have been the next spring, I would not say positively.

Q. That water came through there pretty quickly, didn't it?

A. Yes, sir.

Q. The land all through the project up there and all through that country is patchy, isn't it; that is, some places the soil is deep and of one character and in another place it is light and gravelly, and all that sort of thing?

A. Yes, sir.

Q. Senator Poag has land of that kind, hasn't he?

A. I think he has. I am not very familiar with his soil, the depth; I have never investigated it.

Q. Do you know anything about Mr. Bennett's land?

A. No, sir.

Q. Don't know anything about the character of it at all?

A. No, sir.

Q. Or you don't know anything of the subsoil under his land?

A. Nothing whatever.

Testimony of B. E. Hendrick.

Q. You commenced irrigating for the first time, I understand, some four years ago.

A. Yes, sir, I think so, four years ago this spring, if I remember correctly.

Q. And your irrigation experience has been during that time on your own land?

A. I had experience before that. I worked on an irrigating ranch two years in Montana, and I irrigated for one season on the East place, up near Okanogan.

Q. I was mistaken; I thought you commenced irrigating four years ago when the Government commenced

A. I did on my own place.

Q. The East place, that is up on Johnson Creek, isn't it

A. No, sir, that is south of Dr. Poag.

Q. South of Dr. Poag? Last fall, when you quit irrigating, they were having a shortage of water, I believe you say, and what happened to your alfalfa?

A. Well, it failed to grow.

Q. It burned, did it

A. No, it did not burn; it just didn't grow.

Q. How many tons of alfalfa should be raised off of six acres of ground well irrigated?

A. Well, it will vary from six to eight.

Q. Six to eight tons?

A. I think so.

Q. Well, if you had gotten even six, you ought to have had thirty-six tons, shouldn't you?

The COURT: I would not take time to figure that

Testimony of Millard H. George.

out. I will figure it out myself when I have more time.

Mr. SMITH: That is all.

RE-DIRECT EXAMINATION.

By Mr. BURR:

Q. Have you got a well on your place?

A. No, sir.

Q. In your judgment, with four months' irrigation season, if you had water for that four months, for the full four months, would that be sufficient to raise three crops?

A. Three crops of alfalfa?

A. Yes.

A. It would for me.

Witness excused.

MILLARD H. GEORGE, a witness called and sworn on behalf of the Government, testified as follows:

DIRECT EXAMINATION.

By Mr. BURR:

Q. Your name in full?

A. Millard H. George.

Q. What is your occupation?

A. Farming.

Q. Where?

A. On Poag Flat, at the present time.

Q. How long have you been a farmer, Mr. George?

A. Ever since I was old enough.

Q. Whereabout?

A. In Illinois and Washington.

Q. How much of that is experience on irrigated farming?

Testimony of Millard H. George.

A. Well, for the last three years on irrigating and three years before that on partly irrigated and sub-irrigated. Irrigated by some springs and sub-irrigated from a river.

Q. What are you raising in Okanogan?

A. I am raising alfalfa now. Well, in fact, that has been my main crop ever since I have been in Washington.

Q. Have you some land that is not in alfalfa?

A. I have some dry land, yes.

Q. But of the cultivated land?

A. Of the cultivated land in alfalfa and garden.

Q. How much is the area of that?

A. Of the irrigated land?

Q. Yes.

A. Why, I paid the Government for six acres of water. It has not all been in alfalfa. This spring I finished seeding.

Q. When did you put that in?

A. It will be two years in July and August.

Q. How much did you cut in the year 1911, Mr. George?

A. Last year?

Q. Yes.

A. How many crops?

Q. Yes.

A. Three crops.

Q. When did you irrigate for those crops?

A. I irrigated once a month as near as could be done that year. The ditch broke several times.

Testimony of Millard H. George.

Q. How late did you get water?

A. The last date I got water was in July.

Q. Do you recall what time in July?

A. The last days of July. The water was shut out of the ditch the first of August, so that we had to irrigate in July if we got that irrigation.

Q. How many tons did you get.

A. About forty tons.

Q. How do you know it was forty; how did you estimate the forty?

A. Well, in two ways. One way was by the number of loads and the other way was the number and size of the sacks.

Q. Will you describe that briefly.

Mr. HINDMAN: I think that it is immaterial.

Mr. BURR: All right.

Q. What is the character of your soil, Mr. George?

A. Volcanic ash is the soil, underlaid with coarse gravel, boulders and sand.

Q. How do you know?

A. Digging water pipe trenches there, and taking out rocks.

Q. How many of them have you dug?

A. Two of them; dug one dry one, and one wet one.

Q. How far was it down to the water?

A. It was about twenty-five feet to the water.

Q. Any sub-irrigation anywhere?

A. No, sir, absolutely dry, nothing green growing in it, wild state around it.

Q. Is your land well adapted for getting along with a light amount of water or not?

Testimony of Millard H. George.

A. Well, it is about similar land to anything on the project. It lays rather high, part of it, and it had got a good deal of slope and underlaid with very coarse rock and gravel, at places so much that we did not attempt to clear the boulders out of the soil, anything that did not interfere with the mower we left it in the ground.

Q. Basing your judgment on the amount of water which you are told by the Government people you are receiving—and I will prove that later, your honor—can you raise three crops of alfalfa on two and a half feet?

A. Yes, sir, if I get as much water as I got last year I am satisfied I can get three crops.

Q. When your alfalfa is older will you be able to get along with less?

A. I think I will, yes, it is a lot deeper, a better stand.

CROSS-EXAMINATION.

By Mr. SMITH:

Q. How many years have you been irrigating, Mr. George?

A. Well, on that place three years. In a small way on the river I irrigated some small tracts and sub-irrigated.

Q. That is the Pebstone place?

A. Yes, sir.

Q. What is the contour of the surface of your land where your alfalfa is located?

A. It is rather rough, rolling, and I could not level it on account of the boulders that were in it, and I had to irrigate it just as it lay; some of it lays low while some lays high and it slopes very much.

Testimony of Millard H. George.

Q. Isn't it in a sort of sag?

A. No, there is some of it that it is in a shape that it goes off slanting when the water gets away from you, it is gone. It is like feeding a horse in a box with a crack in it.

Q. How much of your land lies in a sag?

A. Very little, one-fourth of it, about.

Q. Is it on the edge of a sag?

A. No, what is in the sag is practically on the farther side, very small proportion.

Q. All of this in the sag is down in the valley?

A. On the side hill.

Q. This sag is what we might term a small or a young pothole, isn't it?

A. I don't know what you would call it; it lays to the head of the tract. The water all runs from it; it does not run into it, but runs away.

Q. As a usual thing in that country, in those low sags and at the foot of the benches, the soil is heavier, is it not?

A. Yes, the sag is probably better soil than some land on the top.

The COURT: How much land do you have water right for?

A. Six acres.

The COURT: Six acres is all you have the water right for?

A. Yes.

Mr. SMITH: Let me ask you how many acres of alfalfa you have in?

Testimony of Chester Edwards.

A. I estimated it five, and measuring it accurately it was a little less than five.

Witness excused.

CHESTER EDWARDS, a witness called and sworn on behalf of the Government, testified as follows:

DIRECT EXAMINATION.

By Mr. BURR:

Q. Your name in full and occupation, Mr. Edwards.

A. Chester Edwards.

Q. Your occupation?

A. Civil engineer.

Q. How long have you been a civil engineer?

A. Two years.

Q. In what capacity

A. I have worked for the Reclamation Service since June, 1910; part of the time on construction. The last year I have been on hydrography on the Okanogan project.

Q. Who keeps the records of the water deliveries on the Okanogan project, Mr. Edwards?

A. I have kept them for the last year, the season of 1911 and this season.

Q. How much water was delivered to Mr. George in 1911?

A. 3.87 acre feet for his cultivated area. This survey was made with a plane table survey.

The COURT: 3.87?

A. 3.87.

Mr. BURR: Q. That is in acre feet?

Testimony of Chester Edwards.

A. That is in acre feet.

Q. What was the area?

A. 4.4.

Q. How much water was delivered to Mr. Hendrick the same year?

A. 1.26.

Q. Acre feet per acre.

A. Acre feet per acre.

Q. How much land has he in alfalfa?

A. A little over six acres.

Q. Are you familiar with the state of cultivation on Mr. Bennett's land with regard to the suitability for economical irrigation

A. Why, there is portions of it that is in fair shape.

Q. Are you familiar with it, is my question.

A. I am.

Q. What is the condition of it?

A. There are portions of it that are in fair shape. The south end is in very poor condition, between fifteen and twenty acres.

Q. Describe it, please.

A. On the east side it is not even level at all, and there was some places I was over the land this spring and it showed a lack of water on the high points and an oversupply on the low points, showing it was in a pretty poor condition to irrigate.

Q. How much difference in level would there be between the high points and the low places?

A. Why, there was as much as a foot and a half in some places.

Testimony of Chester Edwards.

Q. How can he irrigate the stretches between those two levels in order to get a crop?

A. It would require considerable wild flooding. You would have to swamp the land from the low place in order to get anything on the high places at all.

Q. Are you familiar with any of the land that is partially level?

A. I am.

Q. Did you take any levels?

A. I did.

Q. Will you give us the result of those readings?

A. From the north end of the place there is a long check system, the checks are not sufficiently high to enable the water to get all over the land, it slopes, and it is in fair condition, the slope to the right, for economic irrigation, but the checks are too long, being about five acres, the checks will average about fourteen hundred feet. These checks, I believe, were cut down by Mr. Bennett some time between the 26th of April and the 10th of May.

Q. He has cut them in two?

A. He has cut them in two, the upper end about five hundred feet.

Q. Is it such that he can irrigate more economically than he has in the past?

A. I believe so.

CROSS-EXAMINATION.

By Mr. SMITH:

Q. How old are you, Mr. Edwards?

A. Twenty-five.

Testimony of Chester Edwards.

Q. Did you ever irrigate any yourself?

A. No, sir.

Q. And all you know about irrigating is what you learned out of books?

A. No, sir; my observation on the Okanogan project and the Yakima country.

Q. You have seen some irrigation?

A. I have.

Q. What is that paper you have in your hand?

A. That is the affidavit I made for the amount of water Mr. Hendrick——

Q. What is it?

A. The affidavit I made in regard to the amount of water Mr. Hendrick and Mr. George used in 1911.

Mr. BURR: We were prepared for a temporary injunction.

Mr. SMITH: Q. Why were you using it here just now is what I want to get at.

A. I wanted to get at the exact amount Mr. Hendrick used, one and twenty-six hundredths.

The COURT: To refresh your memory.

Mr. BURR: We will use the original record, if you prefer?

Mr. SMITH: No, we don't want it.

Mr. BURR: All right.

Mr. SMITH: Q. You don't know anything about what kind of soil Mr. Bennett has?

A. I have been over his place.

Q. Well, you just walked over it?

A. Yes, sir.

Testimony of James Shull.

Q. Never dug into it?

A. No, sir.

Witness excused.

JAMES SHULL, a witness called and sworn on behalf of the Government, testified as follows:

DIRECT EXAMINATION.

By Mr. BURR:

Q. Your name in full, Mr. Shull?

A. James Shull.

Q. And what is your business?

A. Ranching, farming.

Q. How long have you followed it?

A. Well, practically all my life, since I have been big enough.

Q. Whereabouts?

A. I have put in about twenty-three years in this country, and about four years in Canada and the rest of the time in North Carolina.

Q. How long did you say here?

A. About twenty-three years here.

Q. Are you farming now?

A. Yes, sir, trying to.

Q. Mr. Shull, have you ever farmed near by Mr. Bennett's place?

A. I farmed what is known as the Heizman place there for a while.

Q. Will you tell the Court what Mr. Bennett's methods of irrigation are?

A. Mr. Bennett?

Q. Yes, sir.

Testimony of James Shull.

A. Why, I don't know.

Q. Was Mr. Bennett on the ranch at the time you had the Heizman place?

A. He was a portion of the time, I think; I was there a year or so before he was.

Q. You were where?

A. At the Heizman place.

Q. In what sort of shape is the Bennett place for irrigation?

A. Well, a portion of it is in poor shape and some of it, I believe, in the the rough, quite rough.

Q. How many irrigations are necessary in that country, in that part of the valley?

A. Well, it depends a little on the season; it varies a little.

Q. Yes.

A. When I was on the Heizman place I raised three crops of alfalfa with three irrigations.

Q. One irrigation to a crop?

A. Yes, sir.

Q. Can the Bennett ranch be irrigated with one irrigation to a crop?

A. I presume at the time I done that, it could.

Q. Have conditions changed?

A. Well, the last couple or two years have changed some from the ordinary.

Q. Been a little drier lately, you think, is that the idea?

A. Yes, sir.

Q. Water has been measured to you by the Government the last few years, has it or has it not?

Testimony of James Shull.

A. Yes, sir.

Q. In your judgment is two and a half acre feet sufficient for the land that you are now irrigating for three crops of alfalfa?

A. Well, I have been getting along fairly well so far. I am getting my water three feet at the creek.

The COURT: What do you say?

A. I get my water at the creek, three feet at the creek, the head of my ditch. I suppose it would amount to two and a half feet perhaps.

Q. In your judgment does the defendant's place require less or more water than the average land?

A. Well, the land in that country varies so much. It would not require so much, I don't think, as mine would, because mine is known as high, dry bench land, and his is between two mountains or hills, in the valley like.

Q. How much have you been receiving for your present place?

A. Water?

Q. Yes.

A. At the rate of three feet at the creek.

Q. And you think Mr. Bennett's place cannot be quite as much as that?

A. Well, I don't know; it depends. I am raising some alfalfa and some trees. I have had very good success as far as I have gone.

Q. What would you say about the necessities for the place?

A. Well, I am of the opinion that Mr. Bennett's

Testimony of James Shull.

place would not take quite as much water as mine, owing to the conditions of the land; it would look reasonable to me.

Q. Are you familiar with the portion of the land sufficient to identify that in your recollection (showing Government's Exhibit 2 to the witness); this is north around here.

A. Yes, sir. Well, it looks like what we call there the rocky strip.

Q. When was that first irrigated, if you recall?

A. I am not sure.

Q. Not sure?

A. No.

Q. What is the condition of that land there, Mr. Shull?

A. It is very rocky.

Q. Would you call that arable land upon which water could be beneficially used or——

A. No, sir, it is not irrigable land unless there be a large amount of work put on it and the rocks taken off.

Q. But in the present condition you would not call it arable land?

A. No, sir, could not make any use of it.

Q. Did you testify how long you had that Heizman place adjoining Bennett's?

A. I have worked it four years.

Q. You are thoroughly familiar with Mr. Bennett's place?

A. Well, I had occasion to pass through it, going

Testimony of James Shull.

up past for my water, and I worked some on the place.

Q. Worked some on the place?

A. I worked some on the place, not a great deal.

Q. Does water run out from that marsh as a rule, Mr. Shull?

A. In the summer season I believe it does.

Q. Runs pretty steady, does it, or only intermittently?

A. Well, during the summer season I think it runs pretty steadily.

Q. How much of a stream?

A. Well, last summer a year ago when I was putting up hay there there was quite a stream. I did not see anybody measuring it.

Q. How wide would you say that brook was?

A. Well, where I went to get water I would say it was a foot or so, or a foot and a half deep.

Q. Run pretty slow or quite fast?

A. About a foot per second.

Q. Was that strip of land, that rocky strip you call it, ever plowed during the time that you were at the adjoining place?

A. No, sir.

Q. Was it ever irrigated to your knowledge?

A. I don't think it was irrigated while I was there. I think Mr. Bennett irrigated it probably soon after I left there.

Q. What year did you leave?

A. I left in March, 1904.

Q. You left the ranch?

Testimony of James Shull.

A. Yes, sir.

Q. Up to that time that land had not been irrigated to the best of your knowledge?

A. I don't think it had. There might have been a small portion of it irrigated at that time, I am not sure, and I would not like to make a statement on that at all.

Q. How much alfalfa did you raise per acre, as near as you can estimate it, on the Heizman place?

A. Why, I don't know, only one year—one year I know how much I raised; I raised eighty-one tons on twelve acres.

Q. Mr. Bennett's land did as well as that, did it?

A. I presume it did; I did not measure the hay, but I measured my own.

CROSS-EXAMINATION.

By Mr. SMITH:

Q. You have signed up with the Government, as we call it up there, have you?

A. Yes, sir.

Q. Where is that land that you are irrigating and have been irrigating for some time with reference to the Bennett land?

A. My land is in section five, township thirty-three, North Range twenty-six.

Q. Well, it is off to the east how many miles?

A. Probably two miles, or maybe better than that, east.

Q. Now, Mr. Bennett's land lies in the coulee just below, where there is a split in the mountains that breaks off to the east and goes down to the town of Okanogan, doesn't it?

Testimony of James Shull.

A. Yes, sir.

Q. And your land lies on a bench down by this other break in the mountains and goes down towards Okanogan?

A. I should judge about two miles from the upper break to the town.

Q. Now, you sold part of your land a short time ago to Mr. Payne?

A. Yes, sir.

Q. Fred Payne, as we call him?

A. Yes, sir.

Q. How many acres have you in alfalfa on your place?

A. Now?

Q. Yes.

A. In alfalfa and clover I think about seven acres.

Q. And how much has Mr. Payne on the part that you sold to him, in alfalfa?

A. I think about two acres of alfalfa or two and a half and perhaps about an acre and a quarter or an acre and a half of clover.

Q. And how many acres has he in trees?

A. Mr. Payne?

Q. Yes. Just approximately, I don't expect you to be accurate.

A. Well, he has in the neighborhood of—I should think about nine acres.

Q. How many acres have you in trees?

A. Well, on the upper place I have about seventeen acres, I should judge, guessing at it; I have never measured it.

Testimony of James Shull.

Q. When you sold him the land you sold him the water also, did you?

A. Well, I sold him that subject to Government conditions.

Q. Yes, I mean you sold him part of your Government water that you had gotten?

A. That goes with the land, that is pertinent to the land, I could not separate it.

Q. That is three acre feet at the creek?

A. Yes.

Q. How far is the creek from your land where you take the water?

A. Well, it is—the Government headgate is just about a mile, I think, to where it goes into my field.

Q. Well, now, all told you have how many acre feet of water?

A. Acre feet?

Q. Or how many acres of water have you?

A. Thirty-four and a half, I believe.

Q. Now, you and Mr. Payne double up on using water; he takes all the water and irrigates, and then you take it all and irrigate?

A. We manage to take it about in—we have got thirty-four and a half acres, and we take it about on an average a day an acre.

Q. In other words, you rotate between yourselves; he takes it all for a while and you take it all for a while?

A. Yes, sir.

Q. And when you go to irrigate your alfalfa you shoot all the water onto the alfalfa and get it all?

Testimony of Laughlin McClain.

A. Yes, sir.

Q. And take it away from the trees?

A. Take it off of the trees and put it on the alfalfa, because we can get done quicker.

Q. That is the way you both do?

A. That is the proper way to do where anybody lives together.

Q. That is the way to irrigate alfalfa, isn't it, put a big head of water on it, and get it wet, and then take it off?

A. Certainly.

Witness excused.

LAUGHLIN McCLAIN, a witness called and sworn on behalf of the Government, testified as follows:

DIRECT EXAMINATION.

By Mr. BURR:

Q. Your full name, Mr. McClain?

A. Laughlin McClain.

Q. Your occupation, Mr. McClain?

A. Builder of irrigation systems.

Q. How long have you been so engaged?

A. About twelve years.

Mr. BURR: I want by Mr. McClain to prove the same sort of testimony that I did in regard to the Sunnyside unit, but very briefly, your honor.

Mr. HINDMAN: It will go in under the same objection.

Mr. BURR: If counsel will permit me I will ask a rather long and leading question in order to bring this matter up. It can just as well be done the other way, but this is much shorter.

Testimony of Laughlin McClain.

Mr. HINDMAN: Go ahead.

Mr. BURR: Q. Will you state your occupation with the Methow Canal Company?

A. I was the promoter of the Methow Canal Company, and at present its manager.

Q. Where is that?

A. In Methow Valley.

Q. Is that similar in climate to the Okanogan country or not?

A. Well, similar.

Q. Will you give the duty of water in the Methow Valley?

A. A cubic foot of water to each one hundred acres delivered between the first of May and the first of October.

The COURT: How much?

A. A cubic foot of water for each one hundred acres.

The COURT: Between what dates?

A. Between the first of May and the first of October.

Mr. BURR: Q. Is that successful?

A. I have not been in the Methow for three years, but as I understand it is pretty successful.

Q. Is it successful for the average crop, or only for fruit?

A. For the average crop.

Q. Where is that with respect to the Okanogan country, in regard to climate?

A. The climate is very similar, the elevation is probably three hundred feet higher.

Q. Will you make the same statement with regard

Testimony of Laughlin McClain.

to the Fruitland Irrigation Company, where is that and what is the duty of water, and so forth?

A. The Fruitland Irrigation Company is a canal near Kettle Falls, in Stevens County.

Q. Your connection with that company?

A. I completed the system and was president of it for four years.

Q. What is the duty there?

A. The duty there is a cubic foot for 160 acres.

Q. For how long?

A. From the first of June until the 15th of September, three and a half months.

Q. Are you familiar with the Okanogan country?

A. Yes.

Q. Is the climate similar to the Kettle Falls country or otherwise?

A. There is more rainfall in the early season at Kettle Falls, at the Fruitland system, than you have in Okanogan.

Q. More?

A. Yes, sir, in the early seasons.

Q. The Wenatchee Canal Company, what is the connection that you have had with the Wenatchee country?

A. I spent three years and a half at Wenatchee, was occupied largely in prompting at that time a high line canal.

Q. What is the duty in that country of water?

A. A cubic foot per second to each one hundred acres.

Q. Is that successful?

Testimony of Laughlin McClain.

A. It is very successful?

Q. The lands are not selling slowly because there is not enough water delivered?

A. I have never heard any such objection.

Q. Is there alfalfa in that country with that duty?

A. Yes, sir.

Q. Is it successful for alfalfa with that duty?

A. Yes.

Q. You are familiar with it down to date, are you?

A. To within the past six months.

Q. How is the climate compared with that at Okanogan?

A. It is very similar.

Q. More or less——

The COURT: The Court will take judicial notice of the climatic conditions.

Q. And the Gordon Valley, Ferry County, have you ever been connected with irrigation there?

A. Yes, I am president of the Kettle Falls Canal & Land Company.

Q. What is the duty there, please?

A. One cubic foot to each one hundred acres.

Q. And what is the length of season there?

A. From the first of June to the 15th of September.

Q. Is that duty successful?

A. It is a new proposition, but there is no objection raised to it by even those that have lived there for ten years, and they have used some water.

Q. Is it intended to raise any alfalfa there?

A. Yes, probably one-half of the district will be in alfalfa.

Testimony of Laughlin McClain.

Q. How long have you been familiar with the Okanogan country?

A. About twenty years.

CROSS-EXAMINATION.

By Mr. SMITH:

Q. I understood you to say, Mr. McClain, that you are an irrigation canal promoter.

A. Yes, and builder.

Q. And builder. You usually promote those canals that trade the farmers water or give them water for half their land, and you take the other half of their land?

A. 'Not usually.

Q. That is the way you did it up in the Methow, isn't it?

A. No, only in a case where a man has no money to buy water, and in order to help the farmer out, we take the land.

Q. In other words, if he has no money you take his land?

A. Yes, that is the only thing he has to take.

Q. And if he has money, those in the Methow, you charged them eighty dollars per acre, didn't you, water right?

A. Forty dollars.

Q. Well, you raised that to eighty, didn't you, Mr. McClain, a little later?

A. I am speaking now when the system was completed. The proposition was, the man that sat down and waited all these years until his neighbors helped

Testimony of Laughlin McClain.

make a success is now paying eighty dollars, and he may be; I have not been there for three years.

Q. Well, you raised it to eighty, didn't you?

A. No.

Q. Now, Mr. McClain, do you know it to be a fact, or don't you, that the Methow Valley has a heavier snowfall than the Okanogan Valley, or even up at Conconully?

A. I would presume that the Methow Valley would have heavier snowfall than the Okanogan.

Q. And it has more rainfall, hasn't it?

A. I don't think it has.

Q. Now, when you went into the Methow to launch that Methow canal you found the Methow Valley generally in a high state of cultivation and irrigation, didn't you?

A. Only to a small extent.

Q. Well, take such men as Thurlow and Risley and all the whole length of the country, banker, Wetzel and Fulton——

A. Risley was the only man practically irrigating—the only man you have mentioned that was under the portion of the country that we irrigated.

Q. Well, now, you found when you went in there that those men that had been irrigating there for twenty years claimed that it required all the way from one to four miner's inches to irrigate an acre of alfalfa, didn't you?

A. Yes, that is right.

Q. And they still claim that, don't they, or did claim it when you left?

Testimony of G. H. Wheeler.

A. Well, some of them claimed it when I left.

Q. Well, all of those who had the water claimed it. Did you see any of the ranches of those fellows who were irrigating at that rate?

A. Oh, yes.

Q. Good ranches, weren't they?

A. Very good ranches, yes.

Q. Raised good crops?

A. Yes.

Witness excused.

Mr. BURR: That is our case, your honor.

Mr. SMITH: It is stipulated and agreed, as I understand it, between the plaintiff and defendant in this case that the defendant has a prior right over the plaintiff to the use of the water in Salmon Creek for all the land that they had irrigated by actual diversion and use, and that that use has extended over a period of more than ten years prior to the commencement of this action, except as to the patch of ground that has been referred to, and will be referred to as the rocky ground, that tract to remain open to proof as to the time on which water has been used, if at all.

Mr. CAIN: It is satisfactory with the qualification that they are entitled to the use of so much as can be used by economical methods.

The COURT: According to the usual course of husbandry in that country.

Exception.

G. H. WHEELER, a witness called on behalf of the defendant, having been first duly sworn, testified as follows:

Testimony of G. H. Wheeler.

DIRECT EXAMINATION.

By Mr. SMITH:

Q. Your name is G. H. Wheeler?

A. Yes, sir.

Q. Where do you live?

A. Okanogan, Okanogan County, Washington.

Q. What is your business or profession?

A. Civil engineer, surveyor.

Q. How long have you been engaged in surveying?

A. Civil engineering, twenty-eight years.

Q. Have you had any experience in irrigation work, ditches?

A. In small ways, yes. No large public irrigation work.

Q. Mr. Wheeler, I hand you a map marked Defendant's Exhibit No. 3, and I will ask you who made that map, if you know?

A. I did.

Q. Are you acquainted with Mr. Bennett's land or lands of the defendant?

A. Yes, sir.

Q. Did you ever make a survey of those lands?

A. I did.

Q. Or a part of them?

A. Yes.

Q. Was the object of that survey to ascertain the number of irrigated acres on that place?

A. Yes, sir.

Q. How did you make the survey—that is, what method?

Testimony of G. H. Wheeler.

A. I used the steel tape and Unions transit, and I proceeded with the same methods as I would in making a process survey, and calculated in the matter required by the United States Surveyor General's office in determining accurate areas.

Q. That was latitude departure?

A. The only system they tolerate.

Q. Mr. Wheeler, would you tell the Court whether that map is an accurate representation of the conditions as you found them on Mr. Bennett's place from an actual survey in the field?

A. It is.

Q. I wish you would explain to the Court what that map represents, that is, the light green, and so forth—explain the map to the Court.

A. The light green represents the area which Mr. Bennett appears to have irrigated, and which he told me he did irrigate, and which shows the irrigated land.

Q. And what does this you have termed swamp land?

A. That is an area of just as it is named; it is called swamp land; it is covered with blue grass, and the most of it was more or less cat-tails, we call them, whatever their true name is—not tules strictly, but cat-tails, cat-tail swamp.

Q. How many acres did you find to be in that swamp?

A. 20.22.

Q. How many acres did you find to be under irrigation, and what Mr. Bennett told you is under irrigation?

Testimony of G. H. Wheeler.

A. Is 63.39 acres of which .57 acres lay outside of his ground and on some one else, or the public domain, which he does not claim. Deducting the .57 which he does not claim as his own leaves 62.82 net area which he irrigates.

Q. When did you make that survey?

A. June 21, 22, 23, 1909.

Q. Did you find on that land a piece of ground that we have referred to on this trial of rocky ground—I mean identify the ground we speak of in that way?

A. Yes.

Q. Is that included in your map of irrigated ground?

A. Yes, sir. I did not make any distinction between what he cultivates and irrigated; I put all irrigated land in one area.

Q. Did you see any evidences of irrigation on that rocky patch of ground?

A. Yes, sir.

Q. What were those evidences?

A. Oh, a good part of the ground, a considerable of the ground is strewn with large boulders, but it shows water has been run over it, little indications, strong indications of having been irrigated and placed under the ditch where he has turned it out; also the vegetation, grass, largely natural grass; to a considerable extent timothy, and I think there was alfalfa; I won't be positive, though, but I know there was a rank stand of forage grasses growing over it, rocks and all, but still bore a considerable crop of forage.

Testimony of G. H. Wheeler.

Q. Are there patches other than that down in there somewheres that looked as though it had not been irrigated, or was dry—that is included in your——

A. I didn't notice any. My trip on that occasion I went around the exterior of the ditch wherever I had to go to make a survey. There may have been points in there which he had not carried water to and there may not; I can't say.

Mr. SMITH: I will say to the Court it is admitted in the record also it will appear there are two little patches in there, marked here that had never been put under water.

Q. Have you made any examination of that recently?

A. Yes.

Q. When did you make such an examination?

A. It was about two weeks ago; I can't give you the date.

Q. What was the purpose of that examination, and what was the extent of it?

A. It was for the purpose of ascertainiing what lay under the surface that could not be seen from the surface, what was the character of the sub-soil.

Q. And what did you do in the way of making that investigation?

A. Mr. Zediker and myself and Mr. Bennett was along. We took a long handled shovel and we put in about two hours and a half or three hours digging the test pits to a depth of from two and one-half to four feet and two inches—that was the deepest one—as far as

Testimony of G. H. Wheeler.

we could go with a long handled shovel—to ascertain what the real nature of that soil was.

Q. Now, would you take a pen or something and indicate on that map the place about where you sank those test pits?

A. I know we sank two holes in the orchard, and that is indicated here in the north forty; we dug three holes in the north forty. I guess that will be sufficient description. I can't say just how many holes we dug; we dug perhaps eight in various portions over it. I did not locate them on the map, nor take data of each hole; that Mr. Zediker did. He took note of the holes, of each one, and I did not.

Q. I do not expect you to be entirely accurate, but give us your best recollection of it.

A. Of the several holes?

Q. Yes, please.

Mr. SMITH: In this northerly forty I will say to the Court that we show that those investigations had been made by three different sets of men, and that is why I want to get his down pretty close.

A. In the orchard we went through about seven inches of loam and granite; it was a fine granite wash with considerable humous in it, an excellent soil about seven inches, though rather porous. Underlying that in the two holes we dug was about ten inches of a loose gravel and sand. After we got through that we went down about two and one-half feet, or as far as we could go—I didn't get to the bottom of it—was more loam similar to the surface. That was the character of the

Testimony of G. H. Wheeler.

two holes in the orchard. One other was dug—we dug two others in the northerly end; they were of the same general character. The details of that Mr. Zediker was taking down, and I did not duplicate them.

Q. Go on and tell the Court what else you found.

A. We noted the gravel bench lying in the east half of the east side of the tract and near its upper end that was very gravelly, but it is irrigated and raises alfalfa.

Q. What did you find in your test pit there?

A. All was rocky so that we could not dig into it to any considerable depth. It is gravelly, yet if irrigated it raises an excellent crop.

Q. How thick was the soil at that point?

A. Oh, a matter of a few inches, two or three or four inches; the soil was very thin gravelly; it was gravel.

Q. After you got through with the few inches on the top what did you find?

A. It was coarser.

Q. Now go the next places and tell the Court what you found.

A. In the two southerly forties and on the west side of the drain from the swamp there was something like, I should judge, ten acres that I had previously spoken of, that was covered, to some extent, with boulders, large and small; had not been cleared, and had not been put in condition for proper cultivation, although it is partially cultivated, to the extent of raising a good crop of hay, or at least furnishing lots of forage. Down at the lower end we went then to a point marked on this map—oh, at the lower end of the map there is a large

Testimony of G. H. Wheeler.

well said to have been dug by Mr. Heizman cribbed up. We were unable to see below the surface of the water, which stood at that time about five and one-half feet below the surface, perhaps six. There was something like ten or twelve feet of water in the well. The soil there is what I would call a gumbo, plenty of soil near the surface, but the deposits thrown off from that why was a mixture of gumbo, and very many—it was full, simply loaded with shells of just such a nature as I have observed on the borders of fresh water lakes and in the vicinity, little snail shells, or fresh water snails, that is common.

Q. Have you covered all the test pits that you sank?

A. That I have—they were also similar—that was in the country—that looked like loam, a nice quality underneath—that was a strata of gravel and that we went through it—when we went through it then we found more of a soil of a rather porous nature—sometimes just a little sticky, but usually quite porous and the lower end was of a gumbo nature.

Q. Now, did you find any volcanic ash soil on that place?

A. There was one place in the orchard that I saw a trace of volcanic ash. Over the rest of it I did not notice any.

Q. Did you make any water measurements or water tests on that occasion?

A. I, no. Mr. Zediker took some water measurements; I checked his readings up, but made no figures on it.

Testimony of G. H. Wheeler.

Q. Were they from weirs that have been put in one of these ditches by some one?

A. Yes, sir; weirs that we found in, nicely constructed, properly constructed.

Q. What kind of weirs, cippoletti weirs?

A. Such as the Government usually uses; I wouldn't say what their name is.

Q. Can you show us on the maps about where those weirs were located?

A. One was the lower one, was near the south boundary of Mr. Bennett's land, one what is marked "M" on this plat, and the other was at the point at the upper end of the ground, or just below the division weir, are the divisions between the two ditches running on each side at the point on this map between the letter "M" and "O" and the word "land."

Q. Does the ditch, the main ditch, coming on to Mr. Bennett's land as you have shown it there represent the intake of the ditch from the creek or point near the spillway, or where is that?

A. I do not recall any spillway, but that is the main ditch that comes from the creek.

Q. That is not the intake?

A. Oh, no, that is not the intake. The intake is about three-fourths of a mile or so upstream.

The COURT: The ditch runs from north and south through the place, does it?

Mr. SMITH: Yes.

Q. Mr. Wheeler, please tell the Court, if you know, how much soil as you found on the Bennett place is

Testimony of G. H. Wheeler.

adapated to the use and consumption of water—that is, whether it requires considerable water to irrigate it or a small quantity?

A. It runs very nicely for irrigating on a gentle slope from the creek to the swamp, ordinarily on a slope of perhaps six feet in a hundred, and slopes directly down from the ditch towards the swamp capable of irrigating nicely a nice slope for irrigating alfalfa, I would say.

Q. What do you know about the duty of water in that country up there on soil of that sort?

A. That would depend on the crop which was intended to raise.

Q. Well, alfalfa, and such crop as you found on the Bennett place?

A. As to the amount being the duty you mean the amount of water it would be necessary to properly irrigate it?

Q. Yes, to the best advantage.

Mr. BURR: I object to that, your honor, no foundation having been laid as to knowledge on that particular head.

The COURT: That is probably true.

Mr. SMITH: It is not a very good foundation.

Mr. BURR: Well, I will waive the objection.

The COURT: You may answer the question, if you know.

A. Well, for that purpose, for alfalfa, or timothy, on a slope of that nature, and with such a sub-soil with gravel lying underneath it I am of the opinion that it

Testimony of G. H. Wheeler.

would require something more than an inch to the acre to grow three crops of alfalfa. I think an inch to the acre would be ample, a miner's inch.

The COURT: What do you mean by a miner's inch to the acre, under what pressure?

A. Six inches.

Q. Do you know what is customarily allowed in that country, if there is any custom, for irrigating that class of crop, and that class of land?

A. A miner's inch under most circumstances is considered the standard.

Q. An inch to the acre?

A. An inch to the acre.

Mr. SMITH: We desire to introduce this map in evidence.

The COURT: It may be received.

The map having been admitted in evidence was marked Defendant's Exhibit 3.

Q. This inch to the acre that was under the six inch pressure?

A. Yes, sir.

Mr. SMITH: That is all. Cross-examine.

CROSS-EXAMINATION.

By Mr. BURR:

Q. What is the nature of this soil you call gumbo—is that clay soil?

A. I do not know the composition.

Q. Sticky soil?

A. The chemical elements of gumbo.

Q. It is sticky soil, isn't it?

A. It is decidedly sticky soil.

Testimony of G. H. Wheeler.

Mr. SMITH: Will you excuse me a minute. There is one thing I did not cover.

Q. Now where should this water be measured, this inch to the acre, as you have given it in this cause—that is, at the land—do you mean an inch of the land or an inch—

A. I mean it would require an inch of the land exclusive of what might stop the water in getting to the point of actually putting it on the crop.

Mr. SMITH: That is all.

Mr. BURR: Q. Did you notice the crop, the nature of the crop below the marsh, Mr. Wheeler?

A. Yes, sir.

Q. Did you notice the character of grass that there is there?

A. Yes, sir.

Q. I mean in the portion that you testified to as being rather rougher than the other below the swamp, and down there?

A. Yes, sir.

Q. Did you notice the ground at all?

A. I did, but it was three years ago and I couldn't tell you. There was everything—there was absolutely everything in the nature of forage on there—alfalfa, timothy and natural grass; there is a little of everything on it.

Q. You spoke of a miner's inch being recognized of the duty of water in that country—do you know of anybody in particular that claim a water right for a miner's inch besides Mr. Bennett?

Testimony of C. M. Zediker.

A. I spoke in a general way of the farmers from Montana to Idaho, and Montana and Washington generally, in the vicinity of which I had been laying out ditches for them for the last twenty-eight years—they always intend to have at least a miner's inch, if it is possible to get it, per acre; that is as much a standard as a quarter of an inch to the rod on the grade of those ditches.

Q. You were not referring to anybody in Okanogan claiming a right of that kind?

A. Not specially, although many in Okanogan whom I know have expressed the same sentiments.

Q. But you do not know of anyone that is claiming an inch to the acre except Mr. Bennett in Okanogan, do you?

A. I don't know that I could specify their names.

Q. How long have you been in Okanogan?

A. Twelve years.

Mr. BURR: That is all.

Witness excused.

C. M. ZEDIKER, a witness called on behalf of the defendant, having been first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. SMITH:

Q. Is your name C. M. Zediker?

A. It is.

Q. Where do you live?

A. Loomis.

Q. How old are you?

Testimony of C. M. Zediker.

A. Twenty-eight.

Q. What is your business or profession?

A. Irrigation engineering.

Q. Have you ever had any experience in actual irrigation?

A. I have.

Q. Tell the Court what that experience has been, please.

A. Well, from the time I was eight years old I have been in an irrigated country. During the year since 1900 I have been identified with irrigation work. Up to that time I was working on my father's place in the Yakima Valley and adjacent property under the Sunnyside canal; between 19 and 1900 I was with the operating department and construction also of the Sunnyside canal. For seven and a half years I was with the Yakima Company of Ione, and at the time the Government bought over the Sunnyside canal from the Washington Irrigation Company I returned and again took up work on that canal. During the season 1908 I had charge of seepage investigations on the lateral system of the Sunnyside canal. In the fall of 1908 I came to Brewster, and was there until July, 1910, constructing and operating what is known as the Shite Stone project at Brewster, bought in some twenty-five hundred acres of land at that point at the present time. From July to the present time I have been connected with the White Stone Irrigation Power Company at Loomis, Washington.

Q. Let me get again how many years you have been

Testimony of C. M. Zediker.

engaged in irrigation engineering, actually making them with your own hands?

A. Well, I have done considerable of it; I have done quite a little in this country, in the Brewster country.

Q. That is just south of the Bennett place?

A. That is some several miles south of the Bennett place in Okanogan county on the land there not only out on the main one, but also lands that would determine a coulee.

Q. How many years did you actually irrigate it for your father?

A. Oh, some seven years.

Q. Did that work consist of the actual spreading of water?

A. It did.

Q. Have you at any time made any examination of Mr. Bennett's land?

A. I have.

Q. When did you make that examination?

A. On the 22d day of May, 1912.

Q. What did that investigation consist of?

The COURT: Shorten it up by reference to the examination of last witness. He covered it very fully.

Q. Did you accompany Mr. Wheeler in making this investigation?

A. I did.

Q. Tell the Court what you found in the way of soil and sub-soil.

A. On the north portion of the ranch there is from six to eight inches of black loam, and underlying this

Testimony of C. M. Zediker.

is gravel sub-soil. In some places it is to quite a little depth and other places it is not so much. It is simply the effects of a wash coming down from the mountains either out of a small creek and spreading out so it is a conglomeration of a little of everything, and there is probably no twenty square feet at which you will find the identical layer that you will find on the other; it is simply a mass.

Q. Mr. Zediker, did you preserve any samples of the sub-soils that you encountered?

A. No, I did not.

Q. All right. I thought likely you had.

A. No.

Q. All right; go ahead and explain.

A. On the north of the swamp there is a very rocky point, in which we could not get down any depth on account of the boulders; and the south of the place we did not dig any test pits, for there on that there was a well there which gave ample evidence of the character of the soil at that end of the farm.

Q. What did you find the character of the soil to be at that end of the farm from digging from the well?

A. Well, it was gumbo, a blue soil with shells in it, seemingly the effect of sediment from a lake some past time.

Q. Will you tell the Court whether you, in your opinion, know the duty of water for irrigating alfalfa and for those crops, both from actual irrigation and from what your book speaks, and what you have observed?

Testimony of C. M. Zediker.

A. Well, I think I do. I kept the record the two seasons on the Brewster ditch and we have there two characters of soil. One is a sort of volcanic ash out on the main Brewster flats. There is a second class of soils lying between the coulee walls and——

Q. That would be something like the coulee walls of the Bennett place?

A. Yes, similar to that. There is a creek running down through a canyon, and they irrigate there and on along the foothills west of the town of Brewster. During the season of 1911 I had charge of the irrigation of the lands on what was known as the company ranch there, embracing this coulee, on which an orchard and alfalfa was growing. The character of the soil was practically the same as in all these canyon beds.

Q. Tell the Court what in your opinion is the amount of water necessary to produce crops of alfalfa, timothy, clover and such crops as Mr. Bennett is growing there on his land to the best advantage?

A. I would say one inch to the acre delivered at the land.

Q. Under what you mean a miner's inch?

A. A miner's inch and four inch pressure.

Q. Now, did you make any investigation as to loss of water in transportation to Mr. Bennett's place or near there?

A. I did.

Q. Would you take this map marked Defendant's Exhibit 3, and show the Court where you made those tests, and how and what they were?

Testimony of C. M. Zediker.

A. There is the three foot cippoletti weirs in the Spring Coulee ditch at the diversion of the Bennett and Heizman ditch—that is, I should say about forty feet below the point of the diversion of the Bennett and Heizman ditch. There is another weir down near the south line of Mr. Bennett's place in the Spring Coulee ditch, I would judge it is about the point marked "K" here on this map; there are three foot cippoletti weirs, the standard.

Q. In good condition, were they?

A. In good condition.

Q. What was about the general size of that ditch between those two weirs?

A. Well, it was two and one-half inch, I should say, at the bottom.

Q. And did you measure the amount going from the upper weir?

A. I did.

Q. And was there any water being diverted, turned out of the ditch between the upper and the lower weir?

A. There was at the time I went there.

Q. Well, I mean at the time you made the measurement?

A. At the time I made the measurement there was not.

Q. What volume of water did you find going over the upper weir?

A. Three and six-tenths cubic feet.

Q. And what did you find going over the lower weir when you measured it?

Testimony of C. M. Zediker.

A. Two and six-tenths.

Q. There was a loss in transportation of one cubic foot?

A. One cubic foot.

Q. And what is the distance?

A. Why, less than a mile.

Q. What character of soil did you find on Mr. Bennett's place; that is, was it volcanic ash, or what was it?

A. No, sir, it was not.

Q. What was it?

A. It was what we term a granite soil.

Q. Black granite?

A. There is a deposit on top, intermixture with granite, leaf mold which comes down from these mountain springs and underneath of it was this decomposed granite. The soil in general could be termed decomposed granite soil.

Q. This ditch where you made this measurement of water, that traversed land of the same general character as you examined?

A. It did.

CROSS EXAMINATION.

By Mr. BURR:

Q. You are connected with the White Stone project, Mr. Zediker?

A. I am.

Q. Are you familiar with the duty of water at the White Stone project?

A. You are speaking of the—

Q. Tracts that you made—

Testimony of C. M. Zediker.

A. At Brewster?

Q. Yes.

A. I am.

Q. The duty of water is one sixty acres a foot on one hundred sixty acres?

A. That is what the contract.

Q. That is rather high and dry, isn't it?

A. That is very dry, enough you cannot grow anything of an orchard with that quantity of water on that project.

Q. There are no friendly slopes to give it additional precipitation up there?

A. The precipitation secured in this country in the summer time is a detriment rather than a benefit.

Q. That is a novel doctrine; I am glad to hear that.

A. For this reason; that there is not sufficient precipitation at any time that the moisture goes down, but it forms a crust on the surface of your ground and has a greater tendency for evaporation. We have sixty-five acres there in orchard there at Brewster and from our experience every time we have a little shower it is a case of cultivate your land immediately, or we lose considerable.

Q. It is an incentive to proper cultivation then, is it not—when you cultivate that make a nice mulch which holds the moisture?

A. Certainly.

Q. That is all on that point. How much water do you figure you are going to get for the project, the White Stone project I referred to?

Testimony of C. M. Zediker.

A. We do not get very much there.

Q. What is your regular supply of water?

A. From creeks.

Q. I mean how much do you figure that?

A. I don't know whether that is really—those figures are rather confidential.

Q. No, I will withdraw that. You say you took no borings on the south part of Mr. Bennett's ranch?

A. No, sir.

Q. Where were those borings located?

A. Up in the northern portion.

Q. Weren't they located practically at the outlet of a slough coming down a canyon, draw coming down a mountain side?

A. No, they were not.

Q. Just where were they located? Can't you give us an idea about where you bored?

A. We made a couple of borings there in the orchard.

Q. Where does that creek come in? Right in here, does it not?

A. Here is Deep Creek.

Q. Did you make any borings down here?

A. I did, yes, sir.

Q. How many up there?

A. I made three there.

Q. Did you make any over here?

A. I made one in the ditch about here.

Q. In the ditch?

A. Yes, sir.

Q. Any on the irrigated land?

Testimony of C. M. Zediker.

A. No, sir.

Q. Now, the discharge from there spreads out fan shape, does it not?

A. It does.

Q. In other words, it puts a little different feature on the country than you would find down below the swamps for example, does it not?

A. It does at that point. It would be a different character of soil than the lands lying immediately below the swamp, but not the lands lying along the Spring Coulee ditch below the swamp and along the ditch line of Bennett and Heizman canal.

Q. The well you referred to in your testimony is that the well on Heizman's place just across the line?

A. Well, I presume it is.

Q. Did you ever investigate below the surface of the soils as to the alfalfa roots?

A. I did not.

Q. I do not mean on his place, but I mean in general.

A. Sir, oh, I have not.

Q. You know alfalfa roots have been known to grow down eighty feet to water, do you not?

A. I know that; I also know in the Okanogan country at Brewster on the same character of soil that we had a spring there and we had a creek running through the place and the land in question was not over eight feet above the creek, and we could hardly put enough water on the land to grow three crops.

Mr. BURR: That will do, Mr. Zediker.

Mr. SMITH: That is all.

WITNESS EXCUSED.

Testimony of A. P. Wheeler.

A. P. WHEELER, a witness called on behalf of the defendant, having been first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. SMITH:

Q. Your name is A. P. Wheeler?

A. Yes, sir.

Q. Where do you live?

A. Conconully, Okanogan County.

Q. How old are you?

A. Forty-three.

Q. What is your business or profession?

A. Civil engineer.

Q. How long have you been engaged in civil engineering?

A. About thirty-three years.

Q. Have you ever had any experience in connection with irrigation work?

A. Yes, sir.

Q. Where?

A. In Lewiston County, Montana, as superintendent of the Dearborn Canal Company, a corporation, later taken over by the State and identified with both corporations and the State of Montana.

Q. What were your duties on that canal?

A. As superintendent for the corporation for about nine years consecutively.

Q. Superintending what?

A. The maintenance, delivery and sale of water, delivery of the water and collection.

Testimony of A. P. Wheeler.

Q. And have you had some experience in the Okanogan country also?

A. Yes, sir, a limited experience there.

Q. Do you know what the miner's inch of water is, four or six inch pressure?

A. Yes, sir.

Q. Did you ever make any physical examination of the land of Mr. Bennett's involved in this case?

A. Yes, sir; I did.

Q. When did you make that examination and with whom did you make it?

A. On, I believe, the 4th day of April of this year, I made an examination of the character of the soil with Mr. Bennett.

Q. Tell the Court what that examination consisted of, what you found?

A. The first test pit was made in the orchard. The first two had a depth of between thirty-six and forty-four one hundredths inches, and about six inches of soil; we found about six to ten inches of soil on top with a strata of from twelve to twenty-four inches of gravel underlying that, and in one place we did not succeed in getting through the gravel—while the next place in the orchard we got through the gravel and encountered a sandy loam underlying a strata of gravel. Then we proceeded east and north and tested the northern portion of the ranch across it to the easterly boundary, and we found on an average of about twelve inches I believe, of loam through the central portion of the northerly part of the ranch, of the northerly forty underlaid in that

Testimony of A. P. Wheeler.

place with a strata of from twelve to twenty inches of sand and gravel intermixed of decomposed granite and quartzite. Then along the easterly boundary, which is in alfalfa at the present time, several test pits were attempted there, but the ground being composed of large wash boulders made it very difficult to get holes down to any considerable depth, and several holes were abandoned after going down some thirty inches or two feet on account of striking large boulders, and we proceeded down to a point just at the northerly edge of what is known as the swamp.

Q. Which edge?

A. A low marshy section, and in the edge of the tules, or cat-tails, as they are locally known, I sank a test pit there between four and five feet, and I found about fifteen inches of loam on the surface, and thirty-four inches, I believe, of sand and gravel underlying the loam, very loose, and coarser gravel underlying that down to the bottom of the hole.

Q. Did you preserve any specimens of any of those diggings down there?

A. Samples from those holes?

Q. Yes.

A. No, sir, I didn't.

Q. Well, proceed with your work.

A. Then on further south—in proceeding south from that point and west I attempted to sample the westerly side where the surface is covered quite thickly with large boulder wash; I found it impracticable to dig any test pits along that westerly side on account of the heavy

Testimony of A. P. Wheeler.

boulder wash. We did sink, however, in all, eight holes down to a depth of from three to five feet altogether, that I made a note of their character of soil. Then going down to the southerly boundary in about the center of the Bennett ranch, just over the fence, or the boundary line, as I supposed it to be, Mr. Heizman had a well that he was digging for water, I suppose for pumping purposes, which was down at a depth at that time of about thirty feet, and noted the character of the soil all the way down to the bottom of that to a depth of twenty feet. We dug no further test pits otherwise than to come back up the grain from that point north, just dug back to the tule swamp.

Q. Does that conclude your investigation?

A. Yes, sir, I think that is all the investigation we made.

Q. Well, Mr. Wheeler, does the kind of soil and sub-soil you found on the Bennett place retain water, or does water run through it rapidly?

A. You refer to the strata of loose gravel and sand?

Q. What I am trying to get at now is what you found there on this place.

A. It was quite porous. All of the northern part of the ranch was underlaid with very porous strata.

The COURT: I don't care for you to repeat the description. Whether it will take much or little water is the question.

A. Taking—considering the whole?

Q. Yes.

A. It will take more than the usual amount of water for land situated in a place as that is situated.

Testimony of A. P. Wheeler.

Q. Now, in your opinion, and from all your experience, and from whatever source derived, technical or actual, tell the Court what, in your opinion, should be the amount of water received by Mr. Bennett to grow the kind of crops that he is growing there, to the best advantage, the water delivered at his land.

A. On how much land?

Q. Well, say per acre.

The COURT: How much per acre?

A. Am I to consider the whole irrigated acreage?

The COURT: The part under irrigation, excluding the swamp.

A. May I be permitted to ask how many acres there are?

The COURT: You can put it in so many acres, feet, or miner's inch. Which ever way you put it makes no difference how many acres there are.

A. The reason for asking that is that it would be impossible to irrigate ten acres with ten inches. A hundred acres might be irrigated with a hundred inches; the amount of water would depend upon the area, the acreage.

The COURT: Well, there are about fifty or sixty acres, then.

Q. Well, we will say sixty-two acres.

A. I would judge that that soil would require for the proper irrigation of alfalfa and timothy, which I found growing on there, at least one miner's inch to the acre.

Q. Under what pressure, four or six inch?

Testimony of A. P. Wheeler.

A. Under six inch pressure.

Q. That volume at the land?

A. At the land.

CROSS EXAMINATION.

By Mr. BURR:

Q. Mr. Wheeler, were these borings that you made the same as were made by the witnesses at first who were examined?

A. Beg pardon?

Q. The borings you made by your independent investigation or were they made the same as the borings that were made by the other witnesses?

A. I dug the holes myself. I didn't see any signs of any other holes having been dug there.

Q. Now, as I understand your testimony—I am not sure whether I am getting it right or not, very briefly: You dug in the orchard?

A. Yes, sir.

Q. Then you went across here, and then down this side

A. Yes, sir.

Q. Keeping fairly well toward the ditch?

A. Over on this side, along here is, if I am not mistaken, is the alfalfa—that is about four or five feet higher. Is this the swamp?

Q. Yes.

A. And we dug test pits all the way around here.

Q. Around the boundary?

A. No, not around the boundary, but across it so as to take a general sampling of it, and so some over here,

Testimony of A. P. Wheeler.

and came back and some over here and then went right down here at the edge of the swamp; then proceeding along down here to this other, this rocky ground, then over into the field down here to this point, and came back up along this side, and over to this, up to the swamp, back right through the swamp.

Q. How many borings all together?

A. Why, that we succeeded in sinking down to a good reasonable depth of from three to five feet, eight holes.

Q. Eight holes?

A. Yes, other short ones that we failed to get down, that I made no mention of, quite a good many of those.

Q. How many did you put on this bench over on this side of the orchard, if you recall, the bench to the south-east of the orchard, I mean—it is practically the east portion of the land, above the swamp, that I refer to.

A. How many?

Q. How many did you put on that bench?

A. The bench emerges from a flat so I am unable to answer that definitely; but on the bench proper one hole down and several attempts which were too rocky to get down. A little higher up we succeeded in getting two holes well down. A little further north, you might call it the bench, or where the bench emerges in the valley bottom.

Q. Then, did you put any, some borings on that rocky which is better shown on here, this portion?

A. I failed; I tried to.

Q. Now, on this rather high land to the west of the

Testimony of F. C. Paine.

marsh near the rocky land but below the little ditch, did you put some borings there?

A. To the west?

Q. To the west of the swamp; I mean the bench along there that slopes down quite rapidly?

A. That is where the hay stacks begin?

Q. Yes.

A. That is just what I referred to. We tried to sink some there, but this was too rocky.

Q. You didn't attempt any in this rocky land proper?

A. More than to find what little soil there was, to find and determine the character of it.

Mr. BURR: I think that is all.

Mr. SMITH: That is all, Mr. Wheeler.

Mr. SMITH: Our stipulation might well go, might be construed to include titles to our land; I don't believe it did and in that case I shall have to make proof unless we can stipulate we are also owners of the land.

Mr. BURR: I will stipulate in reference to that.

F. C. PAINE, a witness called on behalf of the defendant, having been first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Smith:

Q. Is your name F. C. Paine?

A. It is.

Q. Where do you live?

A. I live about a mile and a half above Okanogan, along Salmon creek.

Q. The town of Okanogan?

Testimony of F. C. Paine.

A. Yes, sir; the town of Okanogan.

Q. Between the town of Okanogan and where Mr. Bennett lives?

A. Yes, sir. I live about two miles from Bennett's place.

Q. How old are you?

A. I am about thirty-seven years old.

Q. What is your business?

A. I am a rancher at present. Previous to that I was engaged in engineering work, mining and civil engineering work for about nine years.

Q. Were you some time Water Commissioner for Okanogan County?

A. I was Water Commissioner for Salmon creek two seasons, 1909 and 1910.

Q. What experience have you had, Mr. Paine, at irrigation engineering, and what have you had at irrigating and spreading water?

A. Well, as to the spreading of water I had considerable experience in 1902 with the Bay City Water Company in California measuring water. Since then I have had more or less to do with miner's property as to the actual spreading of the water during the last year I have lived on my ranch where I irrigated it last year.

Q. Was that your first experience at actual irrigating yourself?

A. That is my first experience in actual spreading the water. I was raised on a farm, however.

Q. Have you made any study of the duty of water?

A. Yes, sir.

Testimony of F. C. Paine.

Q. You know where the Bennett land is, I believe you say?

A. Yes, sir.

Q. Did you make an examination of that land a few days ago with a view to ascertain the soil, sub-soil over the ranch?

A. I think it was in May, 1907.

The COURT: This testimony is largely cumulative; I do not think it is necessary to go into it.

Mr. SMITH: There is one additional thing. I think Mr. Paine has sample.

The COURT: I do not care anything for that. You could probably find forty samples on forty acre tracts.

Q. To cut it short, from your experience, from every source, what in your opinion is necessary for Mr. Bennett to have for the irrigation of his land, at his land, for the production of the kind of crops they were growing there, to the best advantage?

A. From my experience—from my experience with my alfalfa, I should judge it would take considerably more water than I have in order to raise alfalfa successfully—that is, my place is only a small percentage of it in alfalfa and the rest is in young trees. The greater part of the water is used on the alfalfa—that is, more water per acre is used for alfalfa than on the trees—and I should judge it would require about double what I have to raise alfalfa successfully.

Q. That would be about six acre feet?

A. In that neighborhood. Probably it would be five acre feet on the land.

Testimony of F. C. Paine.

Q. A miner's inch, or something like that?

A. Yes.

Q. How do you manage your irrigation? You and Mr. Shaw irrigate together, do you?

A. Yes, sir.

Q. You bought a part of his place?

A. Yes, sir.

Q. Tell the Court how you and Mr. Shaw manage your irrigation then.

A. We have about thirty-four and one-half acres for water there and when one irrigates he takes all the water and irrigates until he gets through with it; then the other takes it, he irrigates until he gets his land irrigated; we rotate backward and forward.

Mr. SMITH: I think you may cross examine.

CROSS EXAMINATION.

By Mr. BURR:

Q. Mr. Paine, did you take any measurement of the water when you were water commissioner past Mr. Bennett's place?

A. No, sir.

Q. Just measured the head of the Spring Coulee ditch?

A. Head of the Spring Coulee ditch is the only measurement that I made.

Q. You had no information other than through that course?

A. No, sir.

Q. If there was any water loss between the two places that has been described, in the course of that

Testimony of Frank Carpenter.

ditch, from about the head of Mr. Bennett's place to near the foot of the place where would that water go—if there was a leakage described there where would that go?

A. I think it would be impossible to tell where it would go. The general formation of that country it usually drops down out of sight, and that is all we know about it. Of course there are places where it goes down and comes up.

Q. Doesn't that go down on Mr. Bennett's ranch?

A. It might, or might not.

Q. Doesn't that water escape down on Mr. Bennett's ranch?

A. It might not.

Q. In the investigations on Mr. Bennett's farm, the investigations that you made, did you find any gumbo that you described?

A. I didn't see anything that could be called gumbo, unless it was something that came out of the Heizman well, there is a kind of blue sticky mud—I wouldn't call it a clay; it is more of a lake deposit, something of that kind, sediment.

Mr. BURR: That is all, Mr. Paine.

WITNESS EXCUSED.

Mr. BURR: I am willing to stipulate that there has been a marsh at the present site since the country was taken up approximately twenty years ago.

FRANK CARPENTER, a witness called on behalf of the defendant, having been first duly sworn, testified as follows:

Testimony of Frank Carpenter.

DIRECT EXAMINATION.

By Mr. SMITH:

Q. What are your initials, Mr. Carpenter?

A. D. F. Carpenter.

Q. Where do you live?

A. Riverside.

Q. That is in Okanogan County?

A. Okanogan County.

Q. Do you know where the Bennett land is?

A. I do.

Q. And is there a ranch north of it and adjoins it on the north that is known as the Carpenter ranch?

A. My mother's ranch.

Q. Did you live on that ranch for a number of years?

A. Yes, sir.

Q. Were you born and raised there

A. No.

Q. How many years did you live on that ranch?

A. About sixteen or seventeen years.

Q. Did you do any irrigating on that ranch?

A. I did.

Q. By the way, you folks and Mr. Bennett and some other people who took out the Spring Coulee ditch originally, were you?

A. We were, yes, sir.

Q. For how many years have you been irrigating?

A. Well, I should say about fifteen years.

Q. And that consists in the actual work of irrigation, spreading the water?

A. Well, off and on, yes.

Testimony of Frank Carpenter.

Q. Do you know what a miner's inch of water is under six inches pressure—that is about volume?

A. That is a square inch under a four or six inch pressure.

Q. Well, it is under six inch pressure?

A. Six inch.

Q. And from your experience of irrigation you would know about the volume?

A. Yes, sir.

Q. Of an inch of water. Now where has your fifteen years of irrigation been practiced?

A. Practically on the place adjoining Mr. Bennett's on the north.

Q. How long have you known Mr. Bennett?

A. Well, I should say about eight years.

Q. Ever since he came to the country?

A. Ever since he came and bought the ranch.

Q. What kind of a farmer is Mr. Bennett—that is, is he a good farmer or not?

A. Well, I consider him pretty fair.

Q. What kind of crops has he been raising there, that is as to quality, whether good crops or poor ones?

A. He has been raising pretty good crops, consists of alfalfa principally.

Q. Mr. Carpenter, did you ever see on Mr. Bennett's place any indication of what you thought or took to be too much water being used?

A. I did not.

Q. Would you say to the Court, in your opinion, Mr. Bennett has made a reasonable and judicious use of the water?

Testimony of Frank Carpenter.

A. I will.

Q. From your knowledge of Mr. Bennett's land and working on the ranch adjoining over on the north, how much water do you think would be necessary per acre to produce alfalfa, timothy and clover to the best advantage on Mr. Bennett's place?

A. Well, it would take a miner's inch to the acre.

Q. Under four or six inch pressure?

A. Under six inch pressure.

Q. Where would you want that water, at the land or up at the spillway?

A. Right at the land.

Q. Do you know the swamp on Mr. Bennett's place?

A. Yes, sir.

Q. How long have you known of that swamp?

A. Well, for twenty-three years.

Q. It was there when you got there?

A. It was there when I got there, yes, sir.

Q. And was the Bennett place taken up, as we call it, homesteaded or settled on by anyone at that time?

A. It was.

Q. Mr. Smyth?

A. Mr. Smyth.

Q. Since you have known about that has it increased any in size, to your knowledge—can you say it has increased any in size?

A. It has not.

Q. Have you any information or opinion as to whether it has decreased?

A. Well, I do not think it has much.

Testimony of Frank Carpenter.

Q. It has been staying about the same?

A. About the same; sometimes it is under water, and sometimes it is very near dry.

Q. Have you ever had occasion to pay any attention to the sub-soil on Mr. Bennett's land, and which is up there near your mother's and your mother's property, the Carpenter ranch?

A. Well, underneath where they set the fence poles, put a fence across, there would be probably eight or ten inches good soil black loam; underneath the gravel.

Q. Now, did you raise alfalfa in that kind of soil there?

A. Yes, sir.

Q. What was your observation on your place as to whether it took a lot of water to irrigate that alfalfa or not?

A. It took lots of it.

Q. And what was your observation as to whether your water got away from you rapidly or not?

A. Well, there is part of the land that was kind of sloping, it would take more water of course than that which was level.

Q. I am trying to get at specially whether it seeps into the ground rapidly and got away from you?

A. Yes, it did in places.

Q. Do you know what we have been referring to here from time to time as the rocky part of Mr. Bennett's land?

A. I do.

Q. Did you ever see him irrigating that?

A. I did.

Testimony of Frank Carpenter.

Q. When did you first see him irrigating that?

A. That was about five years ago.

Q. And what was he irrigating then on this land?

A. He was irrigating his alfalfa.

Q. I mean on the rocky part.

A. He was there irrigating alfalfa just below the rocky part, right down through the rocky part to the alfalfa. The rocky part was also irrigated to get the water to the alfalfa below.

Q. What was growing on the rock patch in the way of grass

A. Well, there was wild grass, clover, timothy and some alfalfa just occasionally.

Q. What did Mr. Bennett use that ground for, to your knowledge?

A. Well, he mowed off it, and pastured the balance.

Q. How many years do you know of his mowing it?

A. Well, he mowed it, the lower portion of it, every year.

Q. I am referring now to the rock patch which is under the road.

A. A portion of the rock patch last year, it was all mowed, rock patch all around amongst the rocks.

Q. Well, what are the facts as to whether he used that a good deal for pasture?

A. He pastured it when the hay was cut.

Q. Mr. Bennett was in the cattle business there for a good many years?

A. He was.

Q. And turned his cattle in there in the fall?

Testimony of Frank Carpenter.

A. Yes, sir.

Q. How long has it been since you lived in the immediate vicinity of Mr. Bennett's place?

A. It has been about seven or eight years.

Mr. SMITH: That is all, I believe.

(Whereupon Court adjourned until Saturday, June 1st, at 10 o'clock a. m.).

Saturday, June 1st, 10 A. M.

FRANK CARPENTER resumed the stand for
CROSS-EXAMINATION.

By Mr. BURR:

Q. Mr. Carpenter, you testified as to how much water was necessary on Mr. Bennett's property yesterday. Did you ever take any measurements of water yourself?

A. Not much, no.

Q. Mr. Carpenter, the land that you are farming is in what kind of crop?

A. In alfalfa and clover.

Q. Almost all alfalfa and clover, is it?

A. Yes, sir, and timothy.

Q. Is that land level?

A. It is principally level, yes.

Q. Do you think it is about in the average condition for alfalfa?

A. Pretty fair shape.

Q. Would you say that the land is in as good condition as Mr. Bennett's?

A. Well, yes.

Testimony of Frank Carpenter.

Q. I was referring to the Carpenter place—I think it is in the name of your mother, is it not?

A. Yes, sir.

Q. That is in alfalfa, is it, largely, and clover?

A. Yes, alfalfa, clover and timothy.

Q. That is leveled for cultivation?

A. Yes, sir; that is what I was referring to.

Q. I am asking you some questions in regard to the other property up there near Mr. Bennett's—that is not what you would say about the average condition of the alfalfa of the country?

A. Yes, I believe.

Q. You think it is as good as the average?

A. Yes, sir.

Q. You think it is any better?

A. Well, it is just as good anyway.

Q. Is Mr. Bennett's land in forage crop in as good condition as yours?

A. Yes, sir.

Q. As a matter of fact, isn't the lower end of Mr. Bennett's place very much inferior to yours?

A. Well, the lower portion may be.

Q. It is not very inferior to yours in cultivation—that is, the Carpenter ranch?

A. Well, the southern portion, yes.

Q. Isn't it, as a matter of fact, very, very rough and got to put in an awful lot of water to hit the high places in order to make it profitable?

A. Well, maybe in some portions of it, it is pretty rough.

Testimony of Frank Carpenter.

Q. Is there not fifteen or twenty acres of it in that condition down below the swamp?

A. No, I do not think it.

Q. Mr. Carpenter, how long have you lived in that country?

A. In Okanogan?

Q. Yes, in the Spring Coulee district?

A. Came to Okanogan in 1888.

Q. And Mr. Bennett's principal business was irrigating at that time?

A. He was.

Q. And he was irrigating that same land?

A. No, not that same piece; above there.

Mr. BURR: That is all.

Mr. SMITH: That is all.

Witness excused.

The COURT: The testimony thus far refers to the amount of water necessary at the point where it enters the land. I am of the opinion it will be impracticable until finally decreed to make the water at that point. It seems to me it will be practically at the intake. Whatever the allowance is you will have to account for in the testimony.

Mr. BURR: I think we can probably stipulate that.

The COURT: I just want to have the testimony in such condition that a decree can be entered so that the water can be measured at the proper place.

Mr. BURR: I think we can stipulate that so that it will be satisfactory, Mr. Smith.

Mr. SMITH: Yes, I think so.

Testimony of Byron Munson.

BYRON MUNSON, a witness called in behalf of the defendant, after being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. SMITH:

Q. Your name is Byron Munson?

A. Yes, sir.

Q. How old are you?

A. Thirty-six years old.

Q. Where do you live?

A. Okanogan County.

Q. Where with reference to Mr. Bennett's place?

A. Two miles below Mr. Bennett.

Q. There is just one ranch that intervenes Mr. Bennett and yourself?

A. Yes, sir.

Q. How long have you lived on that ranch where you now live?

A. Twenty-four years.

Q. Do you practice irrigation on that ranch?

A. Yes, sir.

Q. And has this ranch of yours below Mr. Bennett an extension on down to Spring Coulee?

A. Yes, sir.

Q. How long have you been practicing irrigation on your place?

A. Twenty-four years.

Q. And have you been actually irrigating the ground yourself for that long?

A. Yes, sir.

Testimony of Byron Munson.

Q. And how does your land compare with Mr. Bennett's, that is as to soil and climatic conditions, and that sort of thing?

A. Why, it is just about the same.

Q. As to the porous condition, do you think there is any difference—that Mr. Bennett's is more porous or yours more porous?

A. No, I think they are just about the same.

Q. What have you been irrigating for the last twenty-four years?

A. Alfalfa.

Q. Do you know what a miner's inch of water is?

A. Yes, sir.

Q. How long have you been acquainted with Mr. Bennett's land?

A. About eight years, I think.

Q. Well, I don't refer particularly since he has owned it, but that tract of land I am asking you, you have known it ever since you have been there?

A. I have known it ever since I have been there, for twenty-four years.

Q. Well, from your experience as a practical irrigator on your land, land similar to Mr. Bennett's, what in your opinion is the volume of water necessary for Mr. Bennett to have for the growing of alfalfa and other hay such as he is growing there, delivered on the land?

A. Well, the least that I could—would be a miner's inch measured out on the land.

Q. Under what pressure?

Testimony of Byron Munson.

A. Six inch pressure.

Q. Do you believe that that amount is reasonably necessary for Mr. Bennett to have on his land for the growing and maturing of his crops to the best advantage?

A. Well, I believe he would raise more hay and better hay if he had an inch and a quarter on that gravelly soil.

Q. There is a swamp on his place, Mr. Munson, I believe?

A. Yes, sir.

Q. How long has that swamp been there to your knowledge?

A. Well, the first time I ever seen that swamp——

The COURT: It was admitted it has always been there so far as this case is concerned.

Mr. SMITH: Well, if that is the understanding of it, I will abandon that.

Mr. SMITH: Q. Do you know a piece of ground on Mr. Bennett's place referred to as the rock patch?

A. Yes, sir.

Q. Do you know of that being irrigated?

A. Yes, sir.

Q. When do you recall first seeing that irrigated?

A. It has been about seven years.

Q. Are you acquainted with land generally around in that country and under the Okanogan project?

A. Why, I have never been very much on the Okanogan project, no, but I have been over the land some.

Q. Is that land any more rocky than a great deal

Testimony of Byron Munson.

of other land in that country for which the Government has appropriated water, and has been taken up and being irrigated—rocks cleared off?

A. No, I do not know as it is.

Q. In your opinion is that a valuable piece of land? Can the rocks be taken off?

A. Yes, sir.

Q. Have you ever had any occasion to observe the loss of water in transmission through the ditches from that Spring Coulee ditch?

A. Yes, sir.

Q. I wish you would tell the Court what you have observed in that regard.

A. Why, I had a stream of water running in there, irrigating ditches running down through the coulee, had to keep one of my flumes, keep it from drying up, a small stream and Mr. Mennen measured it and he says there was six or eight inches of water in it, and it evaporated.

Q. What is the fact as to whether that ground through the coulee there, Mr. Bennett's place, Heizman's and yours is porous and takes lots of water?

A. Yes.

Q. Have you never examined the soil on Mr. Bennett's place?

A. Yes, sir.

Q. What did you find?

A. Why, I found on the top black loam and underneath that a layer of a kind of granite gravel.

The COURT: That has been gone into quite fully,

Testimony of Byron Munson.

and I don't know whether the Government is going to contradict it or not.

Mr. SMITH: I imagine they won't.

The COURT: Has the land been irrigated during those years?

A. Over in the Meadow Valley irrigated two different seasons.

The COURT: On your own place there below Mr. Bennett's?

A. Thirty-five or forty acres, I should judge.

CROSS-EXAMINATION.

By Mr. BURR:

Q. You testified in regard to the amount of water in your judgment is necessary—did you ever measure the water?

A. I do not know as I have.

Q. Are you familiar with the property purchased by Mr. Lee Cook?

A. Yes, sir.

Q. What kind of land is that?

A. Why, it is porous, gravelly soil.

Q. Did you sell that property?

A. Yes, sir.

Q. Did you sell him the water right?

A. Yes, sir.

Q. Didn't you sell him a water right of three-fourths of a miner's inch?

A. Yes, sir.

Q. You testified a portion of Mr. Bennett's ranch

Testimony of Byron Munson.

was put in about seven years ago—when was the rest of it put in—it was earlier than that, wasn't it?

A. Just this rock patch, I am speaking of.

Q. How much earlier was the rest of it put in?

A. Well, I couldn't say exactly, about fifteen years, I think.

Q. About fifteen years before; seven years ago or fifteen all together?

A. Fifteen all together.

Q. What do you recall about first seeing that rock patch irrigated—was about seven years ago?

A. It is about seven years ago.

Q. How do you recall it was just seven years?

A. Why, I was there working helping Mr. Bennett put up a crop of hay.

Mr. BURR: That is all.

RE-DIRECT EXAMINATION.

By Mr. SMITH:

Q. You were asked something about selling a piece of land, of your land, to Lee Cook?

A. Yes, sir.

Q. And a water right for three-fourths of a miner's inch—was that under six inch pressure or was that—

A. I think it was, yes, sir.

Q. What was that land sold for—that is what kind of a crop?

A. He has got an orchard on it now; he raises some stuff.

Q. Fruit land?

A. Yes, sir.

Testimony of Harry Folmsbee.

Q. Has the water ever been measured to him?

A. No, sir.

Mr. SMITH: That is all.

RE-CROSS-EXAMINATION.

By Mr. BURR:

Q. He is raising something else besides orchard there, is he not?

A. He is raising some stuff between trees.

Q. What is it?

A. Corn, growing stuff, such as that.

Q. That takes considerable water, does it not?

A. It does.

Q. Young trees take considerable water too?

A. They do not take as much water as after they get to bearing.

Q. He is not suffering for water there, is he, Mr. Cook?

A. Well, the water has never been measured to him there yet as I know of.

Witness excused.

Testimony of Harry Folmsbee.

HARRY FOLMSBEE, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. SMITH:

Q. Your name is Folmsbee?

A. It is.

Q. Where do you live?

A. In Okanogan.

Testimony of Harry Folmsbee.

Q. Okanogan town?

A. Yes, sir.

Q. How old are you?

A. Thirty-nine years old.

Q. Have you ever been engaged in the practice of irrigation?

A. I have.

Q. For how many years have you been irrigating—that is, doing the actual work yourself with your shovel?

A. Practically all my life.

Q. When and where was the first irrigation that you did?

A. Colorado.

Q. What part?

A. Around Greeley and Eaton.

Q. What were you irrigating there?

A. Alfalfa and potatoes.

Q. How many years did you irrigate there?

A. Three different summers.

Q. Was your water measured to you?

A. It was.

Q. What volume of water did you use?

A. A miner's inch.

Q. Under what pressure?

A. Six inch pressure.

Q. That is a miner's inch to the acre?

A. Yes.

Q. Where did you next irrigate?

A. In Wyoming.

Q. What part?

Testimony of Harry Folmsbee.

A. Well, it was right on the line between Wyoming and Nebraska.

Q. What were you irrigating there?

A. Alfalfa exclusively.

Q. How many years did you irrigate at that point?

A. Well, most of the time for fifteen years.

Q. Was your water measured to you there?

A. It was.

Q. What volume of water did you use?

A. A miner's inch.

Q. To the acre?

A. To the acre; yes, sir.

Q. And under what pressure?

A. Six inch pressure.

Q. Where did you next do irrigating?

A. I irrigated one summer at Boise, Idaho.

Q. Was your water measured to you there?

A. It was.

Q. What were you irrigating?

A. Alfalfa and clover.

Q. What volume of water did you use at that point?

A. A miner's inch to the acre.

Q. Under what pressure?

A. Six inch pressure.

Q. Where next did you do any irrigating?

A. At Wenatchee.

Q. How long did you irrigate at Wenatchee?

A. Three years.

Q. What were you irrigating?

A. Alfalfa.

Testimony of Harry Folmsbee.

Q. From what ditch did you get water?

A. Read ditch.

Q. Was your water measured to you?

A. It was.

Q. How much water did you use?

A. We was supposed to get an inch to the acre.

Q. Under what pressure?

A. Six inch pressure?

Q. Where did you do any more, any additional irrigating, after you left Wenatchee?

A. Well, I done some irrigating at Okanogan.

Q. It was near Okanogan town?

A. Yes, sir.

Q. How far is that from Mr. Bennett's land?

A. Well, it is about two miles and a half.

Q. Now, do you think, Mr. Folmsbee, from these years of actual irrigating you know how to irrigate alfalfa?

A. I do.

Q. Have you ever made any examination of Mr. Bennett's land?

A. I have.

Q. Did you dig into the soil?

A. I did.

Q. About how many places did you dig in?

A. Well, between ten and fifteen places.

Q. Have you been in the court room?

Mr. BURR: We are not going to contravert the evidence you have already put in on the subject of the sub-soil there.

Testimony of Harry Folmsbee.

Mr. SMITH: Q. Mr. Folmsbee, now, from your experience as a practical irrigator—before I ask this question I want to ask you one more. Now, these years that you have been telling us about irrigating, you have been actually irrigating yourself?

A. I have, yes, sir.

Q. Now, these years of experience and your knowledge of Mr. Bennett's soil, and his land and of the climatic conditions that prevail up there, and other surrounding conditions, what in your opinion is reasonably necessary for Mr. Bennett to produce the kind of crop that he is raising, alfalfa, timothy, and that class of forage, to the best advantage?

A. To the best advantage

Q. Yes.

A. Well, my experience I doubt whether he could irrigate his ranch successfully with an inch to the acre.

Q. Well, what in your opinion, ought he to have?

The COURT: That is all he claims in his answer.

A. As I understand.

Q. I think that in so far as the proof may vary from the pleadings I will ask leave to amend to conform to the proof.

The COURT: Well, he may answer.

Q. How much, in your opinion, ought he to have per acre?

A. Well, he could raise more hay if he could have an inch and a half to the acre than he would if he had an inch.

Q. Now, is his land all alike there—that is, in making

Testimony of Harry Folmsbee.

this answer I want to find out whether there is some of his land that requires more and some less?

A. There are.

Q. And in making your answer have you average it up?

A. Yes, sir.

Q. Do you know the piece of rocky ground that has been referred to on Mr. Bennett's place?

A. I do.

Q. How long have you lived there in the Okanogan country?

A. Six years.

Q. Are you familiar with the land around in that country generally?

A. I am.

Q. And with the character of lands that the Government is irrigating?

A. Yes, sir.

Q. And others are irrigating between?

A. Yes, sir.

Q. Is this rocky patch on Mr. Bennett's place any more rocky than other lands that the Government is watering for other people around?

A. It is not.

Q. Is it not, in your opinion, a valuable piece of ground?

A. Yes, sir.

Q. For fruit and alfalfa?

A. Yes, sir.

Q. You said something of Okanogan; how many years did you irrigate there, or try to irrigate?

Testimony of Harry Folmsbee.

A. Six years ago this summer I helped Mr. Collins irrigate there at Okanogan when he had plenty of water; he irrigated his whole ranch.

Q. That was before the Government came in?

A. Yes, sir, and since that I have helped him. A year ago last summer I helped him to irrigate when the water was measured out to him, and we simply had to quit.

Q. How much water was he getting then?

A. Well, he was only getting, I believe at that time, twelve acre feet—that is, three acre feet for twelve acres.

Q. Well, what experience did you have with trying to irrigate with three acre feet?

A. Why, we could not irrigate at all.

Q. What were you trying to irrigate?

A. Alfalfa.

Q. What did you finally do there?

A. Quit.

Q. Gave it up as a bad job?

A. Yes, sir.

Q. Was the reason you quit because of your lack of water?

A. Yes, sir.

Q. This quantity of water that you think Mr. Bennett should have for irrigating, do you think that he should have that on the land or at some point of diversion above?

A. I think he should have it on the land.

Q. And in the years of irrigation you referred to previously and the volume of water that you used, was that

Testimony of Harry Folmsbee.

on the land, or at some point of diversion away from it?

A. Well in different localities that I have irrigated in it was measured differently. Under some ditches it has been measured on the land, or at the point of diversion at the land. Others at the point of diversion from the main ditch.

Q. Had it both ways?

A. Yes, sir.

Mr. SMITH: Cross examine.

CROSS EXAMINATION.

By Mr. BURR:

Q. Mr. Folmsbee, when were you in Greeley, Colorado?

A. I was in Greeley, Colorado, in 1883.

Q. What were you raising there?

A. Raising alfalfa and potatoes.

Q. How large was your ranch?

A. Forty acres.

Q. They gave you an inch to the acre?

A. They did.

Q. Was that continuous flow?

A. Well, at that time—then, we had a shortage of water and we had to divide up; it was not a continual flow.

Q. You rotated?

A. Yes, sir.

Q. Did they have a man to measure it there for you?

A. They did.

Q. Do you know exactly what you received in acre

Testimony of Harry Folmsbee.

feet—you could not get it in inches because the time was broken up—do you know what it was?

A. Well, we was supposed to get equivalent to a continuous flow of an inch to the acre.

Q. On irrigating a tract of forty acres that is the more economical way to receive water, isn't it?

A. Yes, sir, it is undoubtedly.

Q. You get a double head or treble head for a short time?

A. Yes, sir.

Q. You do not know the reading in acre feet on that ranch as to whether or not they had the exact amount to be delivered under the rotation system?

A. No, sir, I do not.

Q. Now when were you in Boise, Mr. Folmsbee—when were you in the Boise country?

A. I was in the Boise country in the year of 1900.

Q. Did you know that in the Boise country it is unlawful to appropriate as much as an inch to the acre?

A. No, sir.

Q. It is.

A. Well, they were supposed to turn out an inch to the acre at the time I was there.

Q. The maximum upon the most porous soil in the State of Idaho is seven foot to the seventy acres—weren't you familiar with that law?

A. No, sir.

Q. Are you familiar with the annual rainfall, Mr. Folmsbee, at Boise?

A. I am not, no, sir.

Testimony of Harry Folmsbee.

Q. Are you familiar with the rainfall in Colorado?

A. No, sir.

Q. When were you in Wenatchee?

A. In Wenatchee?

Q. Yes.

A. I came to Wenatchee the fall of 1900, the fall of 1900.

Q. What ranch did you irrigate there?

A. I irrigated the ranch that I had; it was four miles above Malaga.

Q. What name do they call that ranch by—is there any particular name?

A. No, sir; I bought it from the railroad company.

Q. How many acres of land did you irrigate in Wenatchee?

A. I have sixty acres under cultivation.

Q. Now, for that sixty acres did you receive a continuous flow?

A. We did when we could get it. Some years the water was short, and some years we had plenty.

Q. Some years you rotated and you had double the amount for a short time?

A. We always rotated.

Q. Always rotated?

A. Yes, sir.

Q. Never did use a continuous flow?

A. No, sir.

Q. Do you know actually how much water you received, the amount measured, in miner's inches?

Testimony of Harry Folmsbee.

A. As I said before we were supposed to get equivalent to our acre feet, only get it all in a bunch.

Mr. SMITH: You mean acre feet or miner's inch?

A. Miner's inch; yes, sir.

Mr. BURR: Q. You never saw the readings as to how much was actually delivered in acre feet?

A. No, sir; we had a man to take care of the ditch.

Q. Where did you say you irrigated in Wyoming?

A. In what is called on the chug water.

Q. Chug water?

A. Yes, sir; northeast of Cheyenne.

Q. What time were you there?

A. We moved there right on the line between Wyoming and Nebraska in the year of 1885.

Q. How long were you there?

A. About fifteen years.

Q. Are you familiar with the law in the state of Wyoming passed in 1890?

A. 1890?

Q. Providing that no allotment of water shall exceed one cubic foot per second for each seventy acres—are you familiar with that law?

A. I am not, sir. Under the ditch that we got our water from we got our miner's inch to the acre.

Q. What is the rainfall in Wyoming, if you are familiar with it?

A. I could not tell you. We paid no attention to the rainfall.

Q. Mr. Folmsbee, will you state where the pieces of land are that you say are as rocky as that rock patch?

Testimony of Harry Folmsbee.

A. As rocky?

Q. Yes, sir.

A. Well.

Q. I have been over the project considerably and I haven't seen any such.

A. You haven't seen such?

Q. No—similar land on the project.

A. Well, there is a good many points and ridges that I know of that is on the project, to my opinion is a whole lot worse than that.

Q. Name one?

A. There is on Dr. Pogue's; there are places, smaller rocks, perhaps a little smaller, the rock comes right up to the top.

Q. Witnesses for the defendant have testified that that land was strewn with boulders?

A. Yes, sir.

Q. Where on Mr. Pogue's, Dr. Pogue's land, is it strewn with boulders?

A. Well, on Dr. Pogue's land, it is smaller, the rocks are smaller.

Q. In other words, you can plant trees between small rocks and boulders where you cannot get in to cultivate.

A. You have got to move them.

Q. You cannot get in and cultivate that land successfully?

A. Well, you cannot cultivate the other successfully without irrigating the rocks.

Mr. BURR: That is all.

Testimony of Harry Folmsbee.

RE-DIRECT EXAMINATION.

By Mr. SMITH:

Q. How about the Hodge's place just on down the coulee below the Bennett place for rocks?

A. Well, as I understand it, that water was not appropriated to that by the Government; it simply was irrigated before, and it is all old water.

Q. How about the rocks?

A. There are just as many there as there are on any part of Mr. Bennett's, as I had a chance to clean up a part of that land, and it costs us \$75.00 an acre to clean off the rocks.

Q. That is, you bought a part of that land?

A. Yes, sir.

Q. Was that any more rocky than the Bennett place?

A. No, sir.

Q. Any less rock?

A. Well, I couldn't say—no, it is not any less; it is about the same. There was some——

Q. How about that land just down below the town of Okanogan we call the Dooley land, that has been rocky, been grubbed, and rock fences made out of it?

A. We consider that absolutely worthless. There are a good many rocks; it is all rock.

Q. The rock has been cleaned off?

A. Yes, sir.

Q. And planted to fruit tree?

A. Yes, sir.

Q. But that whole Pogue prairie in that whole country is generally a boulder wash, is it?

Testimony of A. A. Curtiss.

A. Yes, sir. Rocky reefs run through it.

Mr. SMITH: That is all.

RE-CROSS-EXAMINATION.

By Mr. BURR:

Q. Did you know that tract of land on Dooley's property is not classed as irrigable land, is cut out?

A. I couldn't tell you as to that. I know that Mr. Bolund, if I remember right, had water for the whole tract—at least, he sold off something like forty acres of water, off of that land. I do not know whether the Government gave him that water or whether it was old water right.

Q. You do not know whether that rock portion of it is classed as irrigable land or not, do you?

A. No, sir, I do not.

Mr. BURR: That is all.

Witness excused.

A. A. CURTISS, a witness called on behalf of the defendant, having been first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. SMITH:

Q. Your name is A. A. Curtiss?

A. Yes, sir.

Q. Where do you live?

A. I live at Okanogan, two miles and a half below.

Q. How long have you lived there?

A. I have lived there—let's see—seven years on the present place.

Q. Are you an irrigator?

A. Yes, sir.

Testimony of A. A. Curtiss.

Q. How long have you been irrigating—that is, irrigating yourself, with shovel and hoe, whatever it takes?

A. I have been irrigating off and on, developing ranches for about sixteen or eighteen years.

Q. What have you been raising generally?

A. Alfalfa and all kinds of garden truck.

Q. Have you ever done any irrigating in Okanogan?

A. Yes, sir.

Q. You owned a ranch there?

A. Yes, sir.

Q. And do yet?

A. I do.

Q. What did you grow on that ranch?

A. I first had alfalfa.

Q. What have you got now?

A. I have got orchard.

Q. Did you sign up with the Government?

A. I did.

Q. And did you try to raise alfalfa after you signed up with the Government for three acre feet?

A. I did.

Q. What happened?

A. I fell down.

Q. Didn't get enough water on the alfalfa?

A. No.

Q. How many acres of alfalfa did you have?

A. Twelve acres.

Q. Where is that land located with reference to Mr. Bennett's?

A. It is about three miles south, I believe.

Testimony of A. A. Curtiss.

Q. How does that compare with Mr. Bennett's?

A. Well, it is a little different soil. There is three different soils on my ranch, and on the Okanogan River there is the clay soil, and there is the white ash loam, then there is sand loam soil, gravel, and the gravelly land takes more water than the ash land.

Q. You examined Mr. Bennett's while with Folmsbee?

A. I did.

Q. Which is the most porous, your land or Mr. Bennett's?

A. Well, Mr. Bennett's land is considerably more porous.

Q. How much water did you have that you tried to irrigate with on your place?

A. Well, I believe Mr. Bonstedt, the water master, told me he doubled the dose in our ditch to give us enough water, the evaporation was so much that he doubled the dose. In the Carlo-Riley ditch we could not get the water down there on account of the evaporation and the seepage, so I sold my old water right and quit.

Q. That is, you sold what the Government let you have?

A. Yes, and I installed a pumping plant for irrigation, which is now at the present time on my place.

Q. Why did you sell the old water right?

A. Well, there wasn't enough water to supply me.

Q. In other words, didn't have water enough to do you any good?

A. And not raise alfalfa at all.

Testimony of A. A. Curtiss.

Q. From your experience as a practical irrigator, and your knowledge of Mr. Bennett's land and your own and other lands in that country, and all the conditions that prevail there, what in your opinion should Mr. Bennett receive on his land for the growing of alfalfa and the crops he raises to the best advantage?

A. Well, I have studied this over in a conservative way, and I believe that about a miner's inch to the acre at his ranch would be satisfactory to irrigate with. He has on the upper part of his ranch the most peculiar soil I ever saw. We dug about thirteen holes and every four inches and in some places six inches, ten inches and twelve, and I think thirteen inches the soil is about the deepest we got, and that is underlined with a decomposed granite, and that constitutes a regular sieve, and it takes lots of water to raise alfalfa on that kind of land.

Q. I believe you have some specimens of that subsoil, have you?

A. Yes, sir.

Mr. SMITH: Would the Court care to look at this?

The COURT: If that was brought in here you will have to send a sack of dirt up to the Court of Appeals and I will not permit it. It is not necessary at all, it does not prove anything.

Mr. SMITH: That is all.

CROSS-EXAMINATION.

By Mr. BURR:

Q. Now, Mr. Curtiss, the land that you say you received a double header and a triple header, you did not get a continuous flow?

Testimony of A. A. Curtiss.

A. Why, it was eight days—about eight days on and eight days off, and the water master, I believe, told me he put in about three times the amount that we were entitled to, the neighborhood there.

Q. He put in a triple header?

Q. For one-third of the time?

A. Yes.

Q. When he gave you the triple header?

A. Yes.

Q. How long was your period?

A. Half the time from eight days on and eight days off.

Q. Well, he did not give you any more water than you were entitled to?

A. Well, he did in the ditch; he gave three times as much water as we were entitled to.

Q. Not for one-half the time, though; for one-third the time, was it not?

A. Well——

Q. In order to get it down there quicker.

A. Eight days on and eight days off.

Q. That is when you were getting a double header, was it not?

A. No; they had to do it to reach us.

Q. How long is your ditch?

A. It is—well, to my place I believe it is a little over two miles and a half.

Q. Two miles and a half?

A. Yes, sir, we had a very sandy ditch.

Q. A large amount of this got away?

Testimony of A. A. Curtiss.

A. Yes, it was quite a loss in the ditch of water seepage.

Q. Where was the point of measurement? Up where the water was turned in?

A. Right at old Okanogan, what is called Alma, right above Okanogan.

Q. It was not measured to you at the land, was it?

A. Oh, no.

Q. You do not know how much you got at the land?

A. No.

Q. May have been nine-tenths of it got away?

A. I tried to measure some of it and I did measure some of it, but I did not get any more than what belonged to us; but we could swap water.

Q. That is the proper way to irrigate anyway, isn't it?

A. Yes, sir.

Q. Where is it you said you irrigated first?

A. I developed a ranch in Idaho of 125 acres of alfalfa.

Q. Got a continuous flow there?

A. Well, yes, sir, we were supposed to.

Q. Well, where was it?

A. Seven miles below Shoshone, and Little Wood River.

Q. You were saying sometimes, and I interrupted you—you started to say sometimes and I interrupted you.

A. Sometimes we would help our neighbors out and run a little short ourselves below.

Testimony of A. A. Curtiss.

Q. Did you ever get the exact measurements that you used?

A. Yes, I had a dam that cost me a thousand dollars, and we had a headgate right there at my dam that went in over my dam to my ditch.

Q. Are you familiar with the rainfall in that country?

A. Well, not—I've been there for eight years, and I never measured it, never took notice of the rainfall in particular. It is a dry desert country.

Q. The land you have at present you are puning to, are you?

A. Yes.

Q. Are you getting all your water from puning sources?

A. Yes, at the present time I have got two pumps going.

Q. Do you know how much water you are getting?

A. I measured it but I pump, in the pumping plant I have got thirteen miner's inch; I measure everything with miner's inch; I don't know much about this acre feet business.

Q. You do not run your pumps all the time?

A. No, but I run two of them, and one goes one way and one the other; I never measured the other; it goes about sixteen thousand gallons a day, I think, twelve to sixteen thousand gallons.

Q. How many days do you pump, Mr. Curtiss?

A. Well, my place is all in orchard and I start in pumping about—it takes me about four days to irrigate.

Testimony of A. A. Curtiss.

Q. How many inches of irrigation do you give there?

A. Why, I gave the orchard, I think it was this last year, but it didn't require very much—I could have got along with less, although I have the gravelly land that takes more water than volcanic ash ground. It takes considerable more water for that kind of ground.

Q. Did you ever dig down to find out—have you got a well there

A. Yes, I have got two of them.

Q. How deep is the water?

A. It is twenty-two feet and a half, but it lowers and raises with the river.

Q. How high does it come?

A. Well, it comes about, I think it is seventeen feet.

Q. And drops then to twenty-two; is that the idea?

A. Yes, drops lower than that, to twenty-six.

Q. When you dug that well what kind of stuff did you find on the surface?

A. Regular river bed gravel.

Q. Very coarse?

A. Oh, yes.

Mr. BURR: That is all.

Mr. SMITH: That is all.

Witness excused.

Mr. SMITH: In the interest of time we have Dr. Pogue and Mr. Rueseneau, who will testify on the same line as Mr. Curtiss and Mr. Folmsbee and others, and it is largely cumulative, but I believe that we may dispense with them. Also another witness, Mr. Wilson R. Taylor, who assisted in the construction of these Ben-

Testimony of Wilson M. Taylor.

nett ditches in the first place. My understanding is under our stipulation it is not necessary to make any proof of it.

The COURT: When was this ditch constructed?

WILSON M. TAYLOR, a witness called on behalf of the defendant, having been first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. SMITH:

Q. Your name is Wilson M. Taylor?

A. Wilson M. Taylor.

Q. You live up in the Okanogan country?

A. Yes, sir.

Q. Did you help in the building of these ditches that Mr. Bennett uses?

A. I did.

Q. When were those ditches built?

A. In 1887.

Q. They were built for irrigation purposes, were they?

A. Yes, sir; for the Hodge's ranch, the Mason ranch and the Smythe ranch.

Q. The Smythe is the Bennett ranch?

A. Is the Bennett ranch. We all built them together. I claimed the Hodge ranch at that time, squatter's right, the land was not surveyed.

Q. You are all squatters there?

A. We are all squatters for a good many years.

The COURT: How far is it from where the water is turned out of this ditch that you constructed to the Bennett place?

Testimony of Wilson M. Taylor.

A. About a mile and three-quarters, I should think—a mile and a half or a mile and three-quarters. I never measured it.

The COURT: The water for the Bennett place is taken at that distance from the main ditch?

A. Oh, no, I thought you meant from Salmon Creek.

The COURT: How far is it from the ditch to the Bennett place, to the main ditch?

A. The main ditch goes right through the Bennett place, both of them.

The COURT: How far from the line of the Bennett place is the water taken out for irrigation purposes?

A. At the Salmon Creek, you mean?

The COURT: No, at the other ditch. Where is the individual ditch that Mr. Bennett takes his water from out of the company ditch is what I want to know.

A. It comes right out of Mr. Bennett's land, takes it out any place.

Mr. SMITH: He used them both, your honor. I have taken a little too much for granted. Mr. Bennett uses both these ditches.

The COURT: Those are the company ditches on this place, are they?

Mr. SMITH: One of the ditches used by Mr. Bennett and Mr. Heizman, and the other one over here is used by Mr. Bennett and the people below.

Mr. SMITH: Q. Did you dig that drain ditch in the swamp?

A. I did.

Q. When did you do that?

Testimony of Bert Jones.

A. I did that in 1887.

Q. You took out the water when you got the ditch built in 1887, you took out the water to irrigate?

A. Yes.

Mr. BURR: I have no questions.

Mr. SMITH: That is all.

Witness excused.

BERT JONES, a witness called on behalf of the defendant, after being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. SMITH:

Q. Your name is Bert Jones?

A. Yes, sir.

Q. You live up in Spring Coulee above the Bennett ranch?

A. Yes, sir.

Q. Were you assesessor in 1910?

A. Yes, sir; deputy assesessor.

Q. Do you know where this rock patch on Mr. Bennett's ground is that we have been talking about?

A. Yes, sir.

Q. Did you assess that land in 1910?

A. Yes, sir.

Q. Was it assessed as irrigated land or not?

A. Yes, sir; it was.

Q. Do you know Mr. Bonstedt?

A. Yes, sir.

Q. Did you have a talk with him in the summer of 1910 while you were surveying over at the Burris-Hendricks about duty of water in that country?

Testimony of Bert Jones.

A. Yes, sir.

Q. What did he tell you?

A. We were talking about projects in general, and I asked him what he figured on other projects in different parts of the country, and he said on the projects he came from in Nevada they figured seven acre feet, it took seven acre feet to irrigate down there.

Q. Irrigating alfalfa?

A. He didn't say; he didn't say what kind of crops. He went on—he couldn't see why it would not take that much in this country because they had good soil down there, deep soil, and up here it was rocky, gravelly, and it got just as hot as it did down there.

Q. Did he use any by-words in connection with that?

A. Yes, sir, I think he did.

The COURT: I don't care to have that go in the record, and it is not material at all.

Q. Did Mr. Bonstedt say what kind of a farmer Mr. Bennett was?

The COURT: I don't care what kind of a farmer he is.

Mr. SMITH: All right. That is all, Mr. Jones.

CROSS-EXAMINATION.

By Mr. BURR:

Q. Mr. Jones, did Mr. Bonstedt tell you that they figured the amount of water necessary in Nevada at seven acre feet?

A. Yes, sir.

Q. Did I understand you correctly?

Testimony of W. S. Bennett.

A. Yes, sir.

Q. He did not tell you there was a law over there making thirteen acre feet the maximum that could be appropriated, did he?

A. No, sir.

Q. Passed in 1903?

A. No, sir.

Mr. BURR: That is all.

Witness excused.

W. S. BENNETT, the defendant, called as a witness on his own behalf, after being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. SMITH:

Q. You are one of the defendants in this case, are you, Mr. Bennett?

A. Yes, sir.

Q. How old are you?

A. I am sixty-five.

Q. When did you become owner of your present ranch?

A. In the fall of 1901.

Q. Where did you live before coming there?

A. In the State of Idaho.

Q. Did you ever practice irrigation before you came to Okonogan County?

A. Yes, sir.

Q. What were you raising?

A. I was raising all kinds of crops that grew on the

Testimony of W. S. Bennett.

land in that country and anything that would grow on the land in that country that we planted.

Q. Did you raise alfalfa?

A. Yes, sir.

Q. I wish you would tell the Court as briefly as you can how you raise alfalfa?

A. In the State of Idaho we raised our alfalfa, we irrigated through ditches, what we call ditches. The way we made our ditches we leveled our ground first, put our land in cultivation, leveled our ground, then we took a plow and plowed a furrow and irrigated through them with furrow is the way we irrigated in the State of Idaho. I never saw what we call in this country a levee until I came to Okanogan County. When I came to Okanogan County there was about ten acres of timothy and clover land, in the neighborhood of ten acres, that seemingly had been recently leveed. Well, I thought that levee was in my way, and in the spring of 1902, the first spring that I farmed any there, I plowed that up and harrowed them levees down. And there was people in that country asked to see how I was going to irrigate. I said I didn't want them ridges in it; I irrigate through furrows; I irrigated through furrows, and until two years ago there was not a levee in my field. But the people in Okanogan County thinks and advocates the idea—and I have been told that these reclamation men advocated the idea—that levees was the proper way to irrigate; and I hired a man to help me levee my place. He says, why do you levee your place when you claim it is not the proper way to irrigate, and

Testimony of W. S. Bennett.

I told the man that helped me that I was doing it to try to be popular; that the people didn't recognize me as an irrigator, and I says, I want to be popular, and I says I am trying to avoid a law suit, and I leveed my ground, and if I had to do it over again, law suit or no law suit, I would leave it there in my way.

Q. Have you plowed them out or taken them out, or part of them, or all of them?

A. I have not plowed them out, but I done my best this year with a spike tooth disk to knock all the crop off of them I could. I disked them with a disk and set as crooked as I could, and we can work them down that way and not plow up the field of alfalfa, to level it after I had got it seeded.

Q. Tell the Court how you applied water—that is, how you mature the crop when you first irrigate it?

A. When I first irrigate it we irrigated through these levees. We just turned the water loose out of what we call the head ditch. We had no head ditches in Idaho; we didn't have any use for them.

The COURT: What time of year did you irrigate, Mr. Bennett?

A. Well, we varied in times to irrigate. Sometimes we irrigated April, and sometimes once in a while there is a year that we do not need it till the first of May, but generally in April for the first crop of hay.

The COURT: The first of April?

A. Of May—some time between the middle or last of April generally we turn the water out of these head ditches to flow through these levees, but this year I put

Testimony of W. S. Bennett.

marks, and always—I did every year—we did when we first seeded our alfalfa; we made an arrangement of our own; we take a piece of scantling a few inches wide. If we do not happen to have that we take a pole and split it open and slope it like a sled runner when I was a boy. We pin a piece across the top of that and make these runners so far apart, then run the water down them little trails; ride on them and make an impression on the ground, and run the water down these little trails made with these strips.

Q. When you began applying the water you irrigate once early in the spring?

A. Yes, sir.

Q. Is that to start the alfalfa?

A. Yes, sir.

Q. When do you irrigate again?

A. Just before we cut the crop.

Q. That is the first crop?

A. The first crop.

Q. Then when do you irrigate again?

A. We irrigate again immediately after we get the crop stacked off of that piece of land. I do, and we do—all of us done that in Idaho.

Q. Now, when do you irrigate again?

A. Just before we cut the crop.

Q. Then when do you irrigate?

A. So on the same way through the crops of hay.

Q. How many crops do you raise up in that country?

A. When we wasn't bothered any with this element that has been bothering us in that country, we raised

Testimony of W. S. Bennett.

three crops. Since then I have been raising three crops.

The COURT: You irrigate six times a year?

A. Six times a year for three crops of hay; yes, sir, all except one year.

Q. This element you speak of, that is not the weather?

A. No, sir; the weather don't bother us a particle.

Q. Now, I want you to tell the Court, Mr. Bennett, how the alfalfa, how you mature it—that is, what it looks like when you do mature it your way?

A. Well, when I mature alfalfa my way I have what water I want to use, a crop of alfalfa never stands up; it always drops down. A good crop of alfalfa never stands straight; it always falls until you have got to turn the point of your guards down until you will even pick up gravel to pick up the hay, and sometimes you cut your hay pretty long.

Q. Why do you mature it that way?

A. Because we get more hay.

Q. You grow it faster, too, do you?

A. Yes, sir; it will grow faster if properly irrigated than it will to not properly irrigate it.

Q. Hay grown that way, is that any finer in quality?

A. We suppose that it is a better hay to keep it growing; that is the only way you can grow hay, a good heavy crop. If you have a stand of alfalfa and neglect to irrigate it properly it will quit growing, and if you irrigate it then it don't benefit that crop any. If ever it stops growing and you irrigate it, it just starts a new crop instead of making that old crop grow.

Testimony of W. S. Bennett.

Q. Now, alfalfa even though it is not watered enough to mature crops to the best advantage it will look green, and that sort of thing?

A. Oh, yes, it will look green. I had alfalfa in my field when I left there that was falling down that had been properly irrigated.

Q. This year?

A. Yes, sir; but I didn't irrigate it out of Salmon River.

Q. Where did you get the water?

A. I irrigated out of a little creek called Read's Creek.

Q. Where does that creek come down? Can you show us on that map?

The COURT: That creek is not involved here, is it?

Mr. SMITH: No.

A. This is my barn, and right in here northwest of my barn comes this creek bed. This comes around here in a circle and will run into this ditch.

The COURT: That creek that the land is irrigated from does not seem to be involved here.

Mr. SMITH: No.

The COURT: Then it is not necessary to go into that.

Q. Will you tell the Court, please, or show us where you take your water through those two ditches?

A. No, this ditch does not belong to anyone only Mr. Heizman and I. Here is where it is taken out of the stream. This is where they come together. This is called the junction.

Testimony of W. S. Bennett.

The COURT: On your place?

A. Yes, sir, the line of my place is right here. There is a little piece of land I irrigate out of Salmon ditch before we touch this—it is necessary for me to irrigate from both sides of my field; the way the land is I have got to irrigate, and take it out of both these places.

The COURT: Who uses the ditch after it strikes your land here, how many different parties?

A. After it strikes my land here?

The COURT: Yes.

A. I don't know that I can tell you. I can tell you all the old timers, but it is sold out in orchard tracts. This is my ranch where I live, and the second ranch is Mr. Heizman's, and the third ranch is Mr. Hanson (?), and the fourth ranch is known as the Hollinger ranch now. It used to be the Hodges ranch. The next ranch is Mr. Hanan (?), an old timer; tells me he didn't have any water right in that ditch, the old timer tells me he did not work on it.

Q. Where do you think it will be the most proper place for you to receive the water that the Court awards you in this case?

A. I have got to receive the water at this ditch to irrigate this little patch—that is only a small patch there—I have got to receive water to irrigate that above the junction, right at the junction will be the most appropriate place.

The COURT: How much is there above the junction?

A. I couldn't tell you; something in the neighbor-

Testimony of W. S. Bennett.

hood of two acres, maybe not over an acre and a half, just a three cornered piece of land.

Q. With the exception of this three cornered piece of land, you would like to have it at the junction?

A. Yes, sir.

Q. How far is that junction below the Government spillway in the creek there?

A. The spillway in the Spring Coulee ditch?

Q. Yes.

A. It is almost three-quarters of a mile, besides that far, a mile anyway, besides the creek—the ditch itself crosses the one hundred and sixty acres of land belonging to Mrs. Carpenter, not all now, but it formerly belonged to Mrs. Carpenter. Some of it is sold out in tracts. Some of it is taken off on Charley Carpenter's tract where the spillway is; it is on Charley Carpenter's ranch.

Q. That is almost a mile, you say?

A. It is a half a mile to Mrs. Carpenter's and about a quarter of a mile or three-fourths of a mile, besides; this ditch is very crooked; our hills—well, it shows up here on the map. Only above here the crooks are shorter than they are here on mine. The ditch is built to take in what good land there is in the country, built so as to catch the good land.

Q. Something has been said, Mr. Bennett, about your having to run large puddles of water on he land down there to get water on some other part of it?

A. I don't understand the question.

Q. Something has been said about there being some

Testimony of W. S. Bennett.

high bumps on your land there some place that would necessitate flowing water over the land a foot deep, or something like that in order to reach that—explain all that to the Court?

A. This rock land, this place here on the map is rock—I irrigate it from this west ditch. This is the swamp, and here is the rock. It is on this side where the rock is, along the ditch, of mine and Mr. Heizman's, and it is quite rocky and when—well, it don't matter about that—I was going to tell you the conversation of somebody else. I had irrigated that ever since I have been in the country. I used to run cattle. I irrigated it, pastured it—in the fall when I gathered the cattle off of it, before I turned them on that land, turned them off, first used it for pasture, the second spring I was in the country—the first three years I sowed timothy, and clover seed among them rocks. There is more kinds of grass on them rocks than I believe on any man's farm in five miles. There is bunch grass, timothy, clover, wheat clover, alfalfa; and I sent for some garden seeds to a firm in the east that was advertising seed, and said they would send you samples of grasses over this acre, but I don't know what it is. I just planted it and paid no attention to the variety, but they are growing in them rocks. It makes a good crop of hay, that makes hay after a thrashing, but there are more leaves than there are on timothy; but that is only little patches here and there where I distributed little sample packages of that seed.

Q. Would it be a benefit to that ground or that grass to irrigate it?

Testimony of W. S. Bennett.

A. Yes, sir, there wouldn't anything grow on it only early in the spring, without irrigation, just like bunch grass grows.

Q. To make it a little more definite, now, there are some high places down in here somewhere one hundred and forty feet long, or something like that; tell the Court about those.

A. There is a place on this side of my land, it is about in here. There is a high place there. There has been some photographers hired to go in there and photograph that piece of land, but I had it made from, measured—two of these witnesses has got the measure; I didn't take it down; they measured it with a tape line; they never was ordered on by me or any other man, I don't think. It is a narrow piece; it is something—well, I remember the width, but I don't remember the length. It was forty-five feet, as well as I remember, wide, this backbone, but it is irrigated on three sides of that, but that does not raise a good crop there. If I could have built a flume right here it would only take a short flume to irrigate it like other farmers. I wanted it in here below the swamp in another place. There is a piece in a diagonal shape, I forget the measurement of that—there is a man here that has got the measurement of it—that never was irrigated. All the rest, the rocks that was stated here yesterday that dead grass was seen on it because it could not be irrigated, I can run water on it without making a mark on the ground with a plow or anything, that has all been irrigated; every bump on them rocks has been irrigated but those two places have

Testimony of W. S. Bennett.

not been. They could not be without some work being done.

Q. Tell the Court as nearly as you can the area of those two bumps in acreage.

A. Well, it would be a very small amount. I never tried to figure on it.

The COURT: A quarter of an acre or so?

A. That would be all. I do not believe in my opinion there would not be an acre in the two pieces; there might be, though; a man wouldn't have any need to take any measurements, he could guess at a piece in the center of the field. There are two small pieces there that was never irrigated.

Q. How about this rock patch being irrigated at the time you bought the land?

A. All I know is what the man told me we bought of.

Q. That was Mr. Smyth?

A. Mr. Smyth in looking at the farm of course it is natural for a farmer to try and buy another farm as cheap as he can—said it is practically no good to him; he says it is fine fall pasture, is what Mr. Smyth told me; that is all I know about that.

Q. Did he say how long he had been irrigating?

A. He didn't say he had been irrigating at all.

Q. Were there any indications of it ever having been irrigated?

A. I bought it late in the fall and pastured the grass off.

The COURT: You have irrigated yourself in 1901?

Testimony of W. S. Bennett.

A. I located in that country in the fall of 1901, and the summer of 1902 is the first I ever irrigated.

Mr. SMITH: Q. Do you know what a miner's inch of water is?

A. Yes.

Q. How much water, in your opinion, do you require on that land to properly irrigate it for the production of crop to the best advantage?

A. I have got some land that I think that water won't irrigate. That land—there's no use in me describing it, those other men described it. I helped all those men dig those holes on the ranch. I dug all the holes; they never dug any—setting fence posts, digging to see what was there the first year I was there, and it is all of that gravelly land where it is porous, gravel under it, will require more than an inch to the acre of water, to the acre, to irrigate that, but I have other land that won't require so much.

Q. Now, would you show us on the map about where the land is that won't require quite so much?

A. Right here by this swamp—gets this out in the swamp—this land lies right here until I come to that alfalfa, then there is a piece of land lies right in here is timothy and clover, that there won't require so much water as that gravelly land; it is deeper soil; it don't require so much water as that rocky sandy land.

Q. Average it all up, and tell the Court what in your opinion you should have per acre for the entire place.

A. Well, I don't believe any one irrigator can irrigate it with less than an inch to the acre; it has got to be

Testimony of W. S. Bennett.

—another thing, you can't irrigate it western style and irrigate it. You can't get up at nine o'clock in the morning and get your breakfast late, and get out and change your water, and quit early in the evening and go to town between times and irrigate that with an inch. A great many people irrigate and have pleasures; I can't do it. It is work to irrigate; you have got to stay there, and if a man makes pleasure out of it he has got to have more than an inch; he has got to stay right there with it; and then I believe a man can irrigate it with a miner's inch.

Q. Under what pressure?

A. Under six inch pressure.

Q. Tell the Court whether or not you have ever at any time wasted any of the water from Salmon Creek, or any water at all there on your place.

A. I don't believe there ever was a man that irrigated in his life but what at times has wasted water. There is no man can tell in damp weather—say it comes out a little cloudy and sprinkles a little, and the rain makes it damp, and you turn the water into those furrows during the night and it will run farther than a man calculates it should run, and often runs off. It has run into a swamp that way with me in a night. I have left it at times run into that swamp right close to that swamp there is a little piece of land—there is some alkali on it—I flushed that piece of land quickly—what we call flushed it—run water over it quickly—to get that tall rank start of the first crop of alfalfa. After you get the first crop started it goes good. I flushed it, let

Testimony of W. S. Bennett.

the water run right into that swamp; that is when I first came in there and that is the way I was accustomed to irrigate.

Q. But what I am trying to get at—to advise the Court in a general way whether you have made any wasteful use of water there, practical waste?

A. No, sir; I never practiced wasting water.

A. Have your crops ever burned with anything of that sort in recent years on account of any——

A. Yes, sir; part of my crop burned last year.

Q. For want of water?

A. Yes, sir.

Q. You were having trouble with the Government last year, I believe?

A. Yes, sir.

Q. Or some of the Government employees.

A. Yes, sir; I called the water master's attention to a piece of timothy in these rocks that was burning.

Q. Who was the water master?

A. Mr. Muldrow. He came to my field, where I called his attention to right where he could see it—he was right in my field—I asked him to walk down the line with me. He walked down to where he could see this hay burning.

Q. Did you offer to show him any other of your crops that was burning?

A. Yes, sir; I asked him to go to the most north part of my field and look at some wheat that was sowed with alfalfa.

The COURT: The witness practically admitted that, as I understand.

Testimony of W. S. Bennett.

Q. Mr. Bennett, I don't think of anything else to ask you—is there anything that you think of that you want to tell the Court in connection with the facts of this case, that is essential as to what water you need there on the place?

A. Concerning the use of water on the land I do not know that there is.

The COURT: Cross-examine.

A. Oh, I have made propositions to these reclamation men as to what I would do to keep out the law.

CROSS-EXAMINATION.

By Mr. BURR:

Q. Mr. Bennett, when did you irrigate first this year?

A. I commenced to irrigate on the evening of the 7th day of May.

Q. You testified in regard to the levee system of irrigating as compared with the system that you had been acquainted with in the Weiser country in Idaho; what was the effect of this change? You said you did not like it as well. What was the effect of it?

A. It requires—it is more trouble to me to irrigate that way—it is more bother to be made that way. You have got to go to the expense of leveeing your land; I think it will take more water to irrigate that way than it will in furrows; it does for me. I can irrigate with less water to use furrows than I can to use the levees.

Q. How much of that land have you got into the check system?

A. All of my alfalfa land is under the levee system now.

Testimony of W. S. Bennett.

Q. How much do you estimate your alfalfa is?

A. How much hay to the acre?

Q. How much of your land is in alfalfa?

A. There is in the neighborhood of thirty acres that is irrigated out of Salmon Creek; but I am going to put in more. There is about ten acres of those rocks and thirty acres of alfalfa, that would be forty; there would be about twenty-three acres of timothy and clover there.

Q. Well, there is a good deal of natural grass on that, is there not?

A. There is some natural grass on that.

Q. There is a portion of that that has not been—I am not sure as to that though—you spoke of trouble with Mr. Mulgrow—Mr. Mulgrow was not at that time connected with the reclamation service, was he?

A. He told me he was appointed water master, and asked me if I did not know it.

Q. Well, the water master, water commissioner, isn't it?

A. Well, that is what I call water master, the boss of our ditch. He said he was appointed by the state, by the county.

Q. Yes, sir, appointed by the Judge of the Superior Court and the county—he is not connected with the Government at all, is he, Mr. Bennett?

A. I couldn't tell you; he said he was water master.

Q. The Government has never taken any jurisdiction over your water right?

A. They have tried to.

Q. We have never set that head gate through which you get your water?

Testimony of W. S. Bennett.

A. They made all kinds of threats they would do it, and set times when they were going to do it.

Q. Mr. Bennett, you have a—(inaudible).

A. That has not been figured out.

Q. In the irrigable land there?

A. No, sir; but it was irrigated before I stacked hay there.

Q. It has not been irrigated for the last two years?

A. When I have hay stacks I do not irrigate my hay stacks.

Q. The confines are within the border of that?

A. No, sir.

Q. What is the area of it?

A. I never measured it. It is just hay simply where I stacked part of my hay.

Q. It is half an acre, is it not?

A. It may be a half of an acre, and it may be a little more, I couldn't say as to how much.

Q. Did you ever measure the water directly yourself?

A. I have measured it after the fashion that farmers measure water—rake a square and measure the water that is in the ditch.

Q. You never measured it to know how much you got through the entire season?

A. I had it measured to me, but I never measured it to see how much I got neither season in this country.

Q. Did you ever have it measured to you over the entire season?

A. No measurement of water in this country through

Testimony of W. S. Bennett.

our ditch, not for the entire season, no, sir. I irrigated from Mr. Mulgrow's measure last year over back of my farm, from the time he measured it until we quit farming.

Q. You spoke of the possible loss of water accidentally during the night—you do not of course irrigate during the night time?

A. I do; I let the water run in the field.

Q. I mean you don't stay up and stay with it?

A. No, sir.

Mr. BURR: That is all.

RE-DIRECT EXAMINATION.

By Mr. SMITH:

Q. What kind of crops are you raising on your place, generally?

A. Hay—most all hay, a garden and an orchard; there is hay grows in my orchard.

Q. How much of an orchard have you?

A. It has been assessed to me ever since I have been in that country as one acre.

Q. Is that about what it is?

A. It is closer to that than anything else.

Q. What is your intention—to devote that land to—that is, are you going to continue to raise these hay crops?

A. That is the intention, to raise the hay crops, but if anything should come up that there should be a change in our business affairs in that country, why I would want to raise what I could raise on that land that would be the most money in.

Testimony of W. S. Bennett.

The COURT: That is his right and privilege. I do not care what he intends to do in the future nor what he has done in the past; it is only what he is doing now.

Mr. SMITH: That is all. I think, your honor, with the exception of the computation of the law in transportation—

The COURT: If the water is taken out on his land I do not care for any question beyond that.

Mr. BURR: I am not positive but that in the interest of all concerned we have not made a mistake in the measurement at the spillway. The Act of 1907 will vouch for the transportation of stored water past the gates which are not entitled to it so as to secure the diversion at the point where the water should lawfully be diverted and under that Act we are obliged both in Yakima county and in Okanogan to secure the water commissioners every year to see that the gates along the way are put at such a figure that the water shall go by in proper shape; and I am inclined to think there might be a possibility of complication in the event of our having a decree for the measurement at a different point than the headgates over which the water commissioners have given them jurisdiction; and furthermore, the Government has done this possibly with all the old water right owners of the valley upon the basis of the measurement at the point of diversion; and that is done for the reason that we were unable to take jurisdiction over their system, over their canals, without receiving some compensation for it—we could not lawfully do it; so we had to measure at the point of diversion and that has been done

Testimony of W. S. Bennett.

with the major portion of the owners; so I am inclined to think for the interest of all concerned, and in order to avoid a future cause of action as to what the loss was in transportation, we should probably have a decree for measurement at the point of diversion; but if there was no objection on the part of the parties we could continue the measurement at the same point we had heretofore, namely, at the spillway; and I think we should have a decree there at the point of diversion.

Mr. SMITH: Why cannot we get it there where the ditch is, have it on his place close where he can get water on that little square above?

Mr. BURR: If the Court please the main reason why we brought this action at this time was because in the past the water commissioner's authority over that head-gate has been called in question. Last year, the water commissioner, Mr. Mulgrow, put a sign on the head of that gate under the Act which contains a misdemeanor clause serving notice on the public the gate had been set by the water commissioner.

The COURT: Can't the officer who has authority go any place?

Mr. BURR: No, not beyond an adjudicated water right. Whether the adjudication is this cause with the point of measurement in another place would give him authority to set that gate we are at a loss to know; it might cause litigation.

The COURT: He would have authority to follow the decree to any place, would he not? He would have to measure it at the point from which it is taken—that is, at the point specified in the decree.

Testimony of W. S. Bennett.

Mr. BURR: Then you had two places of measurements—one for the balance of the Spring Coulee ditch, and one for Mr. Bennett. He is given authority by the Act over the headgate of that Spring Coulee canal providing all of the water rights were settled by contract or by decree—we will now have everything settled by contract or decree as soon as the decree is rendered. In that case we have stipulated a *pendente lite*.

The COURT: Can you agree what the loss is between the point where the water is diverted on Mr. Bennett's land, and the point where the water commissioner measured it?

Mr. BURR: I think it was testified yesterday 50 per cent.

Mr. SMITH: I think that is pretty largely a guess; we found 28 per cent of loss.

Mr. BURR: You found that through Mr. Bennett's place there is a heavy loss along there.

Mr. SMITH: It is all along there, too, the same way.

The COURT: I think 15 per cent would be a fair allowance for an old ditch that length.

Mr. BURR: Both witnesses have testified to the fact it was 14.5, something like that down to that upper weir.

Mr. SMITH: Mr. Bennett says his land is in such shape that he has got to take it out of the two places; has got to have his water at two places.

The COURT: The only thing I care for is to make the decree specifically the place the water is measured, so we won't have to try another law suit in case it is violated. If there is no objection I will establish the

Testimony of W. S. Bennett.

point at the point where the water is measured to the other parties and make due allowance for the loss down to the spring.

Mr. BURR: Rather than make it at the headgate?

The COURT: Yes. If there is no objection I will make the measurement at the same point where the water is measured to the other parties and will make the proper allowance of the loss between that point and the Bennett ranch.

Mr. SMITH: That is measured at the spillway, is it not?

Mr. BURR: It is measured at the spillway now—not measured at the headgate.

Mr. SMITH: We would rather have it at the spillway.

The COURT: Very well. The decree might provide for a modification in the event the place of measurement is changed.

Mr. BURR: I believe that would suit everybody to have a modification in case the place of measurement is changed.

Mr. SMITH: We want to be just as nice as we know how; we certainly want to avoid being dragged down here again.

The COURT: I doubt whether that would cause any particular trouble, however, the mere change in the place, place of measurement. How far is the spillway to the headgate?

A VOICE: About thirteen hundred feet, not to exceed that.

Testimony of W. S. Bennett.

The COURT: Well, the loss would be very trifling—that is an old ditch carrying considerable body of water.

Mr. SMITH: It is an awful bad one—you have no idea what it is.

A VOICE: The first part of that ditch is in excellent shape.

Mr. BURR: The contract which we have with all the others is at the headgate. The stipulation pendente lite is at the headgate. We measure at the spillway, but I think the official place should be at the place of measurement. If no one objects we could measure it from other places. I think the decree should be at the headgate. I think that is more satisfactory to you, is it not?

Mr. SMITH: We would very much rather have it at the ranch, if your honor please.

The COURT: This is a matter of law regardless of the water commissioners, or Government, or anything else. This defendant is entitled to have his water measured at the point he takes it out of another ditch—that is, the place at which he had it before any of these laws were passed; but I want to make as pleasant to all parties concerned.

Mr. SMITH: We are not going to cause a bit of trouble. There is no official can check off at the point of measurement any proper measurement, if the point of measurement is put at the land owned.

Mr. BURR: Our defective state laws, so far as I know, there will be merely a case of the Water Commissioners not knowing how much to turn in at the head-

Testimony of W. S. Bennett.

gate—we will lose practically the effect of this entire litigation which we have been trying to bring for two or three years, to Mr. Bennett down here.

Whereupon Court adjourned until 2 P. M.

Mr. BURR: I would like to ask the defendant a question or two.

W. S. BENNETT, recalled.

DIRECT EXAMINATION.

By Mr. BURR:

Q. Mr. Bennett, how deep is that well?

A. Twenty-eight feet.

Q. Is that on a trifle of a bench over and above your alfalfa, a little higher than the alfalfa?

A. A little higher than the alfalfa.

Q. How much would you say?

A. Oh, it is just a gradual slope right off from that house.

Q. Is it five feet higher than the alfalfa?

A. East of the alfalfa I would not think it was over five feet—it may be not hardly that—that is, the alfalfa that raised east of the well, I mean.

Q. The nearest alfalfa?

A. Yes, east it is not much difference, east and south on each side of my orchard, the alfalfa on the south side and on the east, just a natural fall of the ground there.

Q. How long did it take you to get the water from your land—how long have you irrigated it?

A. I irrigate all the time after I commence.

Q. I thought I understood you to say you irrigated six times.

Testimony of W. S. Bennett.

A. I irrigate six times for the crop, but then I have got more crop than you were talking about alfalfa—I give my timothy and clover and me and Mr. Heizman has always changed water; there are times he is watering when I ain't, but we have the water in the ditch for us two all the time.

Q. That is what I am getting at, you do rotate some?

A. Him and I has changed water, yes, sir.

Mr. BURR: That is what I want to ask.

Mr. SMITH: Just one question. Down at the bottom of the well—what kind of material is down there?

A. In the well?

Q. Yes.

A. When you get down twenty-five feet I think you are—

Mr. BURR: (Interrupting). Does it fluctuate between winter and summer, the water surface of your well?

A. Yes, sir.

Mr. BURR: How much?

A. Well, I couldn't tell you exactly how much it does. I dare not let the pump run to the bottom because there is quicksand in the bottom of the well, and if I let it get close to the quicksand it pumps quicksand, and the water is not good; so I had to lift the bottom of the pipe up from the water, from the sand considerably to keep from touching the quicksand.

Mr. BURR: How much fluctuation is between winter and summer between the highest and the lowest?

A. Well, I do not know because my well is filled up until I do not see the water.

Testimony of F. Bonstedt.

Mr. BURR: That is all.

Mr. SMITH: That is all.

Mr. BURR: So that the bottom of the well surface or the top, you said the water was twenty-five feet below the surface of the ground. You meant the top of the water or the bottom of the water?

A. The water is very shallow in this well. It is closer to the top of the ground, but then when I quit digging it, before I filled the well up, the way I fixed my well set in terra cotta, then filled up back with dirt between them, only had two feet of water in the well.

Q. It may have risen since, though?

A. Sure, it might have raised since.

WITNESS EXCUSED.

F. BONSTEDT, recalled, on behalf of the plaintiff, testified as follows:

DIRECT EXAMINATION.

By Mr. BURR:

Q. You heard the testimony in regard to that rocky land, Mr. Bonstedt; will you describe the rock there, briefly, the condition of that soil?

A. The rocks vary from pebbles to boulders as heavy as ten tons. There is a little soil lying between those large boulders, and I did not consider that it could be plowed, or could be mowed if it had a forage crop, with a machine. It might be mowed with a scythe, or sickle.

Q. Mr. Bonstedt, in connection with the digging of the ditches for the Okanogan project, you are familiar with that, are you?

Testimony of F. Bonstedt.

A. Yes, sir.

Q. What showing was there as to the soil beneath the surface on the project as a whole?

Mr. SMITH: The project?

Mr. BURR: Yes, sir.

Mr. SMITH: I do not believe this is rebuttal, your honor.

The COURT: The question is very general. If you do not challenge the testimony as to the particular character of the soil of this land, what is the purpose?

Mr. BURR: As I understand it, I have admitted that this testimony in regard to the character of the soil will not be challenged, but the fact of the character of the soil upon the ground, the water necessary, I do not think I stipulated any admission upon that.

The COURT: Well, if that is the purpose of it.

Mr. BURR: I want to bring out that the soil on the project where Mr. George and Mr. Hendricks have shown they get a fair duty of water, in the company's estimation, the soil beneath the surface is not more retentive of moisture, possibly, than is Mr. Bennett's subsoil, as testified by the defendant, and not challenged by us.

A. I am familiar with the material that was excavated from the canals, and that was very gravelly.

Q. You made some cuts to get considerably below the surface?

A. Yes.

Q. Is the soil beneath the Okanogan project retentive of moisture?

Testimony of F. Bonstedt.

A. Practically. The whole project is underlaid with gravel sub-soil.

Q. Conceding for the purpose of this question that the testimony regarding the soil underneath the surface of Mr. Bennett's land, as shown by the witnesses for the defendant is correct, would you say that that soil is exceptional in regard to the amount of water required or not?

A. That the Bennett soil is exceptional?

Q. Would you say that, admitting—

A. No, I wouldn't testify exceptional.

Q. In your judgment, will the Bennett ranch get along with as small an amount of water, if properly cultivated, as the average land?

Mr. SMITH: We object to that on the ground it has all been gone over in their case in chief.

The COURT: I do not think it is rebuttal.

Mr. BURR: Take the witness.

CROSS EXAMINATION.

By Mr. SMITH:

Q. Just a question, Mr. Bonstedt, please. You think the ditch line from the canal is about as retentive as Mr. Bennett's place, retentive of water?

A. I think the ditch as a whole is less retentive.

Q. As a matter of fact, your ditch, just this side of Okanogan, lost about sixty-eight per cent of the entire volume of water in less than a mile, didn't it?

A. No, not that I know of.

Q. What was the loss?

A. Of the whole canal system?

Testimony of F. Bonstedt.

Q. Oh, no, just in about a mile there?

A. The main canal lost ten per cent of the volume it carried when it was running full.

Q. You cemented how much there this spring?

A. I do not know the exact number of feet.

Q. Well, now, where you did that cement work that piece of ditch lost about sixty-eight per cent of the entire volume of water running through that ditch, didn't it?

A. Only ten per cent, Mr. Smith.

Q. Only ten per cent?

A. Yes, sir.

Q. That would be a loss of about how many cubic feet in that little stretch of land?

A. About a mile and a half, it would be ten second feet from a cubic foot a second.

Q. Mr. Bonstedt, that would be about ten per cent, you say?

A. Yes, sir.

Q. Doesn't the data that is gathered by the experimental stations of the United States show that the loss of water in ditches is twenty-five per cent loss in transportation—is twenty-five per cent?

A. Of the loss?

Q. That is the general average over the state?

A. I don't know what it is, what their figures are.

Q. And don't you know also that the Government tests show that the general average in all ditches, the loss in transportation, from intake to landing, in new ditches is sixty-five per cent?

A. I did not know that.

Q. And in old ditches is fifty per cent?

Testimony of C. M. Zediker.

A. I do not know that. The ditches under the project do not prove that.

Q. You keep any check of the experimental stations—read their bulletins?

A. Occasionally.

Q. Beg pardon?

A. Not of this state; I have known of their bulletins.

Q. Have you read any of the observations by Professor Fortier, Samuel Fortier?

A. I have read his articles for many years on cultivation.

Q. Now, I will ask you if you read those, if he does not say that the duty of water in the State of Washington in his "Water and Forest" is a pamphlet entitled, in July to October, 1906, states the duty of water in Washington is the general average is eight acre feet per acre?

A. I do not know that.

Q. Did you ever read his "Water and Forest?"

A. No, sir.

Q. That report will be found in work on water rates, third edition, page 525.

Mr. SMITH: I think that is all, Mr. Bonstedt.

WITNESS EXCUSED.

C. M. ZEDIKER, recalled as a witness in behalf of the plaintiff, testified as follows:

DIRECT EXAMINATION.

By Mr. BURR:

Q. Mr. Zediker, you testified that you had been on the Sunnyside unit for some time?

A. Yes, sir.

Testimony of C. M. Zediker.

Q. Of the Yakima project?

A. Yes, sir.

Q. Do you know the duty of water down there?

A. I do.

Q. What was it?

A. The amount delivered to the farmers at the present time by the Government is three acre feet, but that has not been successful for the proper growing of crops. The majority of the people in that country have had to put out a considerable area of their land to orchard to make that duty of water suffice. Of course under that project there are lowlands that do not require that, but on the bench lands of volcanic ash origin that quantity of water is not sufficient, though it is the amount stated in the contract.

Q. Don't you know, Mr. Zediker, that under the old Washington Irrigation Company, the predecessor of the Government, they delivered one cubic foot to 160 acres?

A. I know that under the contract of the Washington Irrigation Company the contract called for one cubic foot per 160 acres, but at no time up to the time that the Government purchased that project did they measure the actual quantity of water to the settlers; in fact, for the last two years that I was with the Washington Irrigation Company I acted in the capacity of assistant to the superintendent, and it was my work to settle disputes between the farmers and the controller as to the duty of water, not the amount, under their contract, the company was obliged to deliver to them, but the amount which they actually needed for those lands.

Testimony of A. A. Curtiss.

Q. Well, Mr. Zediker, did you ever observe alfalfa roots going down to water—do you know how deep they go?

A. I have seen occasions in that country where they have gone twenty-eight feet, twenty-four feet.

Q. Don't you think the alfalfa roots in Mr. Bennett's land are down to water, Mr. Zediker, honestly?

A. I don't. There might be as light area south of the swamp.

The COURT: I know it will burn up in twenty-four hours when water is within six feet of the surface.

A. I had some experience with water at Brewster, with water within five feet of the surface of the year mentioned.

Mr. BURR: That will do, Mr. Zediker.

WITNESS EXCUSED.

A. A. CURTISS, recalled as a witness on behalf of the plaintiff, testified as follows:

DIRECT EXAMINATION.

By Mr. BURR:

Q. Mr. Curtiss, I think you testified that you put some land in fruit and that you are pumping to it?

A. Yes, sir.

Q. How much more water was required on alfalfa than your fruit, will you estimate roughly?

A. Well, it is a good deal owing to the land.

Q. Well, right on your piece there?

A. On the present land I have?

Q. Yes.

A. Well, take it as an average?

Testimony of F. Bonstedt.

Q. Yes, sir; half as much or twice as much, or fifty times?

A. Well, I should want three times as much as the present water that I use for the trees.

Q. How much more would it need on Mr. Bennett's place than you are using for your fruit, would you say?

A. Well, I have one acre of ground something similar to Mr. Bennett's. Now, for illustration, I sent my sparker in my engine here to Spokane, and I had to hire another pumping plant to pump water on that ground, and they was not just fixed up right, and I put eight oil cans to the cherry tree, and it was not over half an hour until it was out of sight.

Mr. SMITH: I heard you tell about that. I understand it, but I do not believe you made it plain whether you hauled those cans of water to the tree?

A. I carried them right from my trough; the row of trees is right up and down, right in front of my house.

Mr. BURR: How many times more water would it take to raise alfalfa on Mr. Bennett's place than it takes to raise trees on yours, that is what I want to get at—half, or more, twice as much, or fifty?

A. It would take about three times the amount, I should think.

WITNESS EXCUSED.

Mr. BURR: There are just about a couple of questions I would like to ask Mr. Bonstedt.

Mr. BURR: Q. Mr. Bonstedt, will you relate any measurements that you made in regard to the amount of water Mr. Curtiss used on his, any computation—I

Testimony of A. Castile.

do not mean measurements you made in regard to Mr. Curtiss' use of water.

A. I made some computations from figures that Mr. Hodge gave me. He stated that he is using 13 miner's inch in irrigating eleven and one half acres; but during the season of 1911, pumped this water, pumped it twelve days at the rate he was pumping, or the quantity he placed upon these eleven and a half acres would amount to about—yes, a little over six acre feet—it would be about fifty-seven one hundredths of an acre foot per acre.

WITNESS EXCUSED.

Mr. BURR: I would like to call Mr. Castile for a few questions.

A. CASTILE, recalled as a witness on behalf of the plaintiff, testified as follows:

DIRECT EXAMINATION.

By Mr. BURR:

Q. Mr. Castile, in regard to that land below the swamp on Mr. Bennett's place, what is the condition of the gravel—what kind of gravel—

Mr. SMITH: That has all been gone into and I object to it as not rebuttal.

The COURT: He may answer the question.

A. There are four or five acres of that land covered with wire grass and salt grass, and some cat-tail, which shows indication of excessive moisture.

Mr. SMITH: We object to that. He was not asked anything about what it shows, but what is there.

Mr. BURR: He has qualified as an expert.

Mr. SMITH: His answer is not responsive to the question.

Testimony of A. P. Wheeler.

The COURT: He has answered the question, although it is not in rebuttal of anything offered here.

Mr. BURR: I thought they testified to the character of the grass down there, the condition it was in.

The COURT: That was part of your original case; you went into it in the first instance. He has answered the question, however.

Mr. BURR: Q. Mr. Castile, admitting for the purpose of this question that the testimony given on behalf of the defendant in regard to the soil beneath the surface, on Mr. Bennett's land, would you deem the conditions exceptional in regard to the amount of water necessary, or the contrary?

A. I would deem it exceptional.

Q. Would you deem that his land upon that showing would need more water than average land in that country, or would not?

A. I would not.

Mr. BURR: That is all.

Mr. SMITH: That is all.

WITNESS EXCUSED.

A. P. WHEELER, witness recalled on behalf of plaintiff, testified as follows:

DIRECT EXAMINATION.

By Mr. BURR:

Q. Mr. Wheeler, you testified that as to what the amount of water necessary on Bennett's place was, have you ever had measurements for any given tract for the entire season, so that you can tell exactly how much was used?

Testimony of G. H. Wheeler.

A. Yes, sir; but not in this state, nor any particular individual contract of a certain number of acres that I can call to mind at this time, and I have measured several of them.

Mr. BURR: That is all.

WITNESS EXCUSED.

G. H. WHEELER, witness recalled on behalf of the plaintiff, testified as follows:

DIRECT EXAMINATION.

By Mr. BURR:

Q. Mr. Wheeler, did you ever have these measurements upon any particular tract of land of a given number of acres for an entire season so as to ascertain the real amount of water actually used upon that tract for that entire year?

A. No, sir.

Mr. BURR: That will do.

Mr. SMITH: That is all.

WITNESS EXCUSED.

W. C. MULDROW, recalled on behalf of the plaintiff, testified as follows:

DIRECT EXAMINATION.

By Mr. BURR:

Q. Mr. Muldrow, conceding for the purpose of this question that the testimony given in regard to the character of the soil beneath the surface on the defendant's place is correct, is the showing exceptional in regard to the amount of water necessary or otherwise?

A. I so regard it.

Q. Beg pardon?

ques...

Testimony of ---. ---. Edwards and ---. ---. Shaw.

A. I would regard it as exceptional for that country.

Q. Mr. Muldrow, did you ever see excavations made in alfalfa land for to see how deep the roots grow?

Mr. SMITH: Oh, we concede they go away down, your honor.

The COURT: They go to the bottom. That is all.

Mr. SMITH: That is all.

WITNESS EXCUSED.

---. ---. EDWARDS, witness recalled on behalf of plaintiff, testified as follows:

DIRECT EXAMINATION.

By Mr. BURR:

Q. How much, if you know, is the slope from the upper end of Mr. Bennett's place to the marsh?

A. My notes show 28 feet from the water surface in the ditch to the swamp on the north end.

WITNESS EXCUSED.

---. ---. SHAW, recalled on behalf of the plaintiff, testified as follows:

DIRECT EXAMINATION.

By Mr. BURR:

Q. Mr. Shaw, you heard the testimony on the part of the defendant in regard to the character of water, from your experience in irrigation of the adjoining lands, would you say that two irrigations for each crop as testified by the defendant would be necessary?

A. Why, I think so.

Q. You think it would be necessary?

A. Unless it would be an unusually dry year.

Testimony of W. C. Muldrow.

Q. For the second and third crop?

A. I do not think last year I used any more than that. Well, I mean I did not use all of four years—I don't think for any year I used over six irrigations through the year. I used less when I irrigated for three crops three times through the year—irrigated from four to six times for three crops.

Q. You irrigated from three to six times for the sixth crop?

A. Yes, sir; three crops.

Mr. BURR: I see.

WITNESS EXCUSED.

Mr. BURR: I would like to ask Mr. Muldrow.

W. C. MULDROW, recalled on behalf of the plaintiff, testified as follows:

DIRECT EXAMINATION.

By Mr. BURR:

Q. You heard Mr. Folmsbee testify in regard to the tract of land on the Carpenter place, that he was unable to raise alfalfa, did you not?

A. I did.

Q. Will you tell us the character of the cultivation on that tract?

A. I had occasion to be called down there by Mr. Carpenter to act in that capacity to look over that tract in regard to irrigation, and he figured putting water over it on the alfalfa, and the tract was underlaying river bottom just in old channels, so level it would be practically impossible to get any head of water. He had done a great deal of work this spring—had tried to do a good

Testimony of W. C. Muldrow.

deal more before attempting to irrigate—that is in leveling.

Q. He has changed it since?

A. He had intended at one time to raise alfalfa on it and gave it up. Now he wanted to put alfalfa in again.

Q. What is the condition of that piece of land today?

A. He has done a great deal of work on it this spring, but the time I examined it he was doing a good deal more of work in leveling.

WITNESS EXCUSED.

Mr. SMITH: That is all with the exception of this transportation matter of the allowance in loss of transportation. I think we would like to get this water at or about Mr. Bennett's north line. I believe that under the law he would be entitled to it there where he has been taking it heretofore; in other words that he could not be put in a worse position than he was.

Mr. BURR: If your honor please, the measurement of the water below the floodgate of that canal makes it impossible for any unprejudiced official, either on the part of the State or on the part of the Federal Government, under any act that I know of, to say whether or not Mr. Bennett is receiving his share of water, or whether he is not. It makes it absolutely impossible for anyone to tell, and the state law fixes the headgate as a place where we are able to get an impartial measurement of the water which the ditch is entitled to. To measure it at his headgate, the upper end of his land, is simply to throw the matter open to a state of anarchy, from which the government hopes to emerge by the

means of this suit; it was for that fully as much as in order to determine the water right that this case was brought. This case is intended to give to the state commissioner, appointed by the Superior Judge of the county, jurisdiction over the head gate of that canal in order to insure the safe passage past that head gate, as well as some six or eight purchasers of the water, to which the main canal of the Okanogan project is entitled. To give Mr. Bennett the water at the other point some mile or two below the head gate, is simply to throw the whole case open for an injunction case, or for contempt, or for something, in order to measure the amount of the delivery. I believe that under the act of 1907, under which the water commissioner was appointed, the Court is in a position to specify the amount at the head gate, with a proper amount for loss in transit to Mr. Bennett's land. That will place the matter beyond dispute and beyond interference on the part of the Government, and beyond interference on the part of any water users, among whom the United States is one.

The COURT: It is about a quarter of a mile from the head stream, as I understand it, to Mr. Bennett's place.

Mr. BURR: The place he drew his plea for is two or three miles below.

We are asking authority for the head gate of the ditch, which I think is far preferable from the legal standpoint, or practical standpoint, at the spillway. This whole matter will have to be fought out again in case this matter is left open. The Spring Coulee averaged

more, according to our figures, than it was entitled to, considering the contract. Even with the extreme Mr. Bennett was now getting, in order to get the matter pendente lite, we sought in that old decree handed down, we sought to name an inch to the acre for the purpose of investing in the water commissioner control over that head so we could get water by it.

Mr. SMITH: The distance from Mr. Bennett's north line to the intake ditch is something like a mile and a quarter. I am sure this Court has jurisdiction over this decree, and if Mr. Bennett is given the water at his place there, at his north line, about that, we are willing to forego any relief for any loss of transportation at all, we will take chances on it.

The COURT: I do not think the decree will have any practical effect so far as the Government is concerned, unless it shows the amount of water taken at the defendant's stream, at its head; it will be wholly inoperative otherwise.

Mr. SMITH: Do you purpose to give it to us from the spillway?

Mr. BURR: The point of measurement of the spillway down. We will give 1300 feet over this 280—we would add to the 15 per cent pro rata above the spillway. Do I make myself clear?

The COURT: Yes, that explains it.

Mr. BURR: I would be willing to add to that 15 per cent qualification from the spillway per cent, point of measurement, down to Mr. Bennett's place, such proportions as the length of the ditch above the spillway is to that below, at the rate of 15 per cent.

The COURT: What would that be practically?

Mr. BURR: I do not know the distance from the spillway down. Mr. Muldrow, I think, has it. Mr. Bonstedt—Mr. Castile, have you that figure from the spillway to the Bennett land?

Mr. BONSTEDT: I think Mr. Bennett's specifications is about right. It is not over a mile and a quarter—something between a mile and a mile and a quarter.

The COURT: A mile and a quarter from the spillway down?

Mr. BONSTEDT: No, from the headgate to Mr. Bennett's land.

The COURT: That would leave about a mile from the spillway probably to this land?

Mr. SMITH: We are up against another matter there. If he could take the water at the headgate we have got to take it past their spillway. If he took that spillway out or away, the water would be spilling down the creek.

The COURT: The dividing line will be wherever it is at the present time. If it is changed, it would have to be changed. I only put it so as to be uniform.

Mr. SMITH: If he took that spillway out of there——

The COURT: I will make it the spillway for the present as long as the dividing gate is there, unless you are going to change it right away.

Mr. BURR: I think we are going to put in a different headgate practically. We will have a measuring device in our headgate in accordance with the state law.

The COURT: Why didn't you put it in then according to the state law?

Mr. BURR: Why not put it there now?

The COURT: Well, it should be at the same place.

Mr. BURR: It should be at the same place, yes, but we have not had until this decree comes in—we have not had jurisdiction over that headgate; that is the point.

Now, the state commissioner, the water commissioner, will have jurisdiction over that and can put in a weir; the act requires him to see that the proper measuring device is at that point of diversion. Up to now we have not had jurisdiction over it, because Mr. Bennett has not been covered by a judication or contract, and has not been any place over which the court has jurisdiction.

The COURT: If you move it right away, I will place it at the head of the ditch.

Mr. BURR: That is satisfactory.

Mr. SMITH: I would like the decree to embrace that or take that up.

Mr. BURR: That is satisfactory. As long as he rotates, it seems to me that the acre foot basis in accordance with the man he rotates with, takes his water, and every old and new user receives it upon the acre foot basis—I think it would be better to have it on the acre foot basis.

The COURT: I do not care which way it is put.

Mr. SMITH: We would rather have it in cubic feet on the miner's inch, because they do not understand this

acre foot business up there. That is talked by the Government officials and those experts, and we know nothing about it. We do not know whether it is right or not right, but we do know something about the other two measurements.

The COURT: Of course, the state officer would only have to reduce it to the other measurement in order to comply with the law anyhow.

Mr. BURR: It seems to me that the equivalent is very easy, for this reason; for twelve hours and six minutes a second foot running makes one acre foot precisely.

The COURT: What is your system of delivery?

Mr. BURR: We have contracts.

The COURT: Do you deliver it whenever they demand it?

Mr. BONSTEDT: We deliver it upon notice.

Mr. SMITH: When you get ready.

Mr. BONSTEDT: No, we deliver it on forty-eight hours' notice, so as not to waste water, so we can't adjust our ditch for water there at the proper time, not before and not later.

Mr. BURR: That is immaterial on the Spring Coulee, because that order would be fixed by the state water commissioner; then they would have to arrange their distribution among themselves.

The COURT: Well, you are not concerned with that.

Mr. BURR: No, not concerned with it.

The COURT: Not yet.

Mr. BURR: As long as there are like two dozen water users, and they all receive it on the acre foot basis, in common with every old water user and new water user in the entire country, it seems to me that it would be the more proper way to have the Court decree. It is immaterial to me anyway to any vital extent.

Mr. SMITH: It does not concern them after the water is in the ditch.

The COURT: I think the decree should be based on the unit of measurement prescribed by the state law, otherwise the legislature doesn't need anything. Now, I understand that substantially forty inches under six inch pressure is equivalent——

Mr. SMITH: To a cubic foot.

The COURT: I understand substantially forty inches under six inch pressure is equivalent to a cubic foot, is the understanding.

Mr. BURR: I think it is thirty-eight, isn't it?

Mr. SMITH: We take forty for short in round figures.

The COURT: Do you desire to file a brief in this case.

Mr. BURR: I would like to.

Mr. SMITH: We don't care to.

The COURT: All right; I will file an opinion in the case, a brief opinion, as soon as the testimony is transcribed. How long do you want to file the brief.

Mr. BURR: Three weeks.

The COURT: Very well; that is satisfactory to me.

Mr. SMITH: If the Court please, in the first in-

stance we would not care to file a brief. We would rather submit it to the Court for your honor to decide without arguing. If they submit a brief, we would like to have a little time to answer it.

The COURT: I am going to award to these defendants just what I think they are entitled to under the state law before they went in there, and not impaired to any extent by subsequent legislation, and I think that question is fairly well settled by the Supreme Court decisions of the state. If there is nothing further, we will adjourn court till Monday morning at 10 o'clock.

Endorsements: Statement of Facts and Testimony.
Filed June 22, 1912.

W. H. HARE, Clerk.

By S. M. RUSSELL, Deputy.

No. 1271.

In the District Court of the United States, Eastern District of Washington, Northern Division.

UNITED STATES OF AMERICA,

Complainant,

vs.

W. S. BENNETT and JOSEPHINE BENNETT,
his wife,

Defendants.

OPINION.

Oscar Cain, U. S. Atty.

E. C. Macdonald, Asst. U. S. Atty.

Smith & Gresham, for defendants.

RUDKIN, District Judge. Under the provisions of the Reclamation Act of June 17, 1902 (32 Stat., 388), and the Act of the Legislature of the State of Washington entitled, "An Act relative to the appropriation of waters of the state for irrigation purposes, granting to the United States the right of exercising the power of eminent domain in acquiring lands, water and other property for rights-of-way, and for reservoir and other irrigation works, granting to the United States certain rights in state lands and waters of the state, relating to water users' associations, and declaring an emergency," approved March 4, 1905 (Laws of 1905, p. 180), the United States in the year 1905 appropriated all the unappropriated waters of Salmon River in Okanogan County, of this state. Long prior to that date the defendants herein and their predecessors in interest appropriated and diverted a part of the waters of Salmon River for the purpose of irrigating and reclaiming certain lands now owned in fee simple by the defendants, and it is conceded that the rights of the defendants are superior to the rights of the Government, to the extent of their prior appropriation and use of the waters appropriated for beneficial purposes. The extent of the preference or prior right of the defendants is therefore the only question presented for consideration on this hearing. The question thus presented is one of fact and an extended review of the testimony would serve no purpose. There is some dispute as to the number of acres actually irrigated by the defendants, but the Government claims that some thir-

teen acres of the defendants' land is rocky and cannot be profitably cultivated or irrigated, rather than disputes the fact that this part of the land has been in fact irrigated. Suffice it to say on this point that the land has been irrigated by the defendants for pasturage and other purposes; it is land for which water might be appropriated and was appropriated and used, and the fact that the Government or others might be able to use the water to better advantage and with greater profit on other lands in no manner militates against the right or title of the defendants. There is a wide and irreconcilable conflict in the testimony, or perhaps better say a wide difference of opinion, as to the quantity of water required to properly irrigate the land in question, varying as the testimony does, from two and one-half to three acre feet during an irrigating season of one hundred and twenty days, to one inch of water per acre, measured according to the custom of miners under a six inch pressure. The testimony clearly shows that the defendants' land has a gravelly, porous sub-soil and requires an unusual quantity of water to properly irrigate it. The crops grown by the defendants, consisting of alfalfa and timothy and clover, also require a greater quantity of water than do orchards and other crops that might be mentioned. The defendants have submitted a form of decree awarding to them two cubic feet of water per second of time for the sixty-three acres under irrigation, to be measured at the point of diversion. This is equivalent to about nine acre feet for an irrigating season of one hundred and fifty days. True, the testimony

shows that there is a loss of about twenty-five per cent from evaporation and seepage between the point of diversion and the point of use, but making due allowance for this loss I am satisfied that no such quantity of water is required for the proper cultivation of the defendants' land. I think an allowance of one and one-half cubic feet per second of time, to be measured at the point of diversion from the river, if properly used and husbanded, will be ample to supply all the needs of the defendants and will meet the full requirements of their prior appropriation. A decree will be entered accordingly.

In view of the form of the decree presented by the defendants I might suggest that no injunction can run against the United States, and it is the only party plaintiff. It is not to be presumed that the Government will deprive the defendants of rights decreed to them by one of its own courts, but if some officer of the Government should disregard the decree in the future the defendants must seek their remedy against the officer committing the wrong and cannot obtain relief against the government itself, without authority from Congress. In view of the fact that this is a proceeding to determine adverse claims to water, in which the defendants claim more than they are entitled to and the Government concedes less, no costs will be allowed either party.

Endorsements: Opinion.

Filed July 9, 1912.

W. H. HARE, Clerk.

By S. M. RUSSELL, Deputy.

No. 1271.

In the District Court of the United States, Eastern District of Washington, Northern Division.

UNITED STATES OF AMERICA,

Complainant,

vs.

W. S. BENNETT and JOSEPHINE BENNETT,
his wife,

Defendants.

DECREE.

This cause came on regularly for hearing and trial on the merits on the 31st day of May and the 1st day of June, 1912; the plaintiff appearing by Oscar Cain, United States Attorney, and E. W. Burr, Special Assistant to the United States Attorney, and the defendants appearing in person and by their attorneys, Smith & Gresham and W. W. Hindman, and the Court having heard all of the evidence and the arguments of counsel and being fully advised in the premises, and all the evidence in said cause now being on file in this court, it is hereby ORDERED, ADJUDGED and DECREED as follows:

I.

That the defendants are the owners in fee simple and in possession of the first right to divert, for irrigation, stock and domestic purposes from Salmon Creek, situated in Okanogan County, Washington, one and one-half ($1\frac{1}{2}$) cubic feet of water per second of time, to be measured at the point of diversion from the said river, during the irrigating season of each and every year,

which season is adjudged to be from April 15th to September 15th, and which is to be used upon the following described premises situated in Okanogan County, State of Washington, to-wit: The West half of the Southeast quarter of Section Thirty-six (36), Township Thirty-four (34) North, of Range Twenty-five (25) E. W. M., the Southwest quarter of the Northwest quarter and Lot Two (2) in Section Thirty-one (31), Township Thirty-three (33) North, of Range Twenty-five (25) E. W. M.

It is further ORDERED that if the plaintiff elects to measure water at any other place below the point of diversion from said river, the amount of water hereby awarded defendants shall be the same as fixed herein. It is further

ORDERED that the defendants and each of them be, and they are hereby, perpetually enjoined from diverting any greater amount of water from said stream than is herein awarded unto them. And it is further

ORDERED that neither party shall recover costs.

Done in open Court this 12th day of August, 1912.

(Signed) FRANK H. RUDKIN,
Judge.

Endorsements: Decree.

Filed August 13, 1912.

W. H. HARE, Clerk.

By S. M. RUSSELL, Deputy.

No. 1271.

In the District Court of the United States, for the Eastern District of Washington, Northern Division.

UNITED STATES OF AMERICA,

*Plaintiff,**vs.*

W. S. BENNETT and JOSEPHINE BENNETT,
his wife,

Defendants.

ASSIGNMENT OF ERRORS.

Now, on this 20th day of September, A. D. 1912, comes the plaintiff, United States of America, by Oscar Cain, United States Attorney; E. C. Macdonald, Assistant United States Attorney, and E. W. Burr, Special Assistant to the United States Attorney, and says that the decree entered in the above cause on the 13th day of August, 1912, is erroneous and unjust to the plaintiff:

First: Because the defendants are awarded a greater amount of water than is necessary, with due economy, for the irrigation of their lands.

Second: Because the decree is based upon an erroneous ruling of the Court, that the defendants are entitled to use and maintain the same means employed by them in conveying water to their land and the application of said water thereon, that they had employed at the time of acquiring rights to said water, irrespective of whether such means employed by them were productive of due economy in the use of water.

Third: Because said decree was based upon a ruling of the Court that the defendants are entitled to as much water as was used by them in accordance with the usual course of husbandry in the district in which their lands are situate, irrespectively of whether or not such usual methods of husbandry are in accordance with due economy in the use of water.

Fourth: Because said decree awards the use of water to the defendants during a longer irrigation season than is shown to be necessary.

Fifth: Because the Court awarded defendants a greater quantity of water than is necessary for growing the principal crop of the country; and declined to enter a decree awarding, in the alternative, water sufficient for the growth of alfalfa, or for orchard purposes, accordingly as the lands under consideration might be devoted to such usage.

Sixth: Because said decree is contrary to the evidence as to the amount of water necessary for the cultivation of defendants' land.

Seventh: Because said decree awards to defendants vested rights in the water in controversy in excess of their necessities, the title to said water being in the public, under police powers of regulation, to be exercised with the view of obtaining the greatest possible use of the same.

WHEREFORE, The plaintiff prays that said decree may be modified and that the District Court be directed

to enter a decree in conformity with the evidence submitted in the case.

(Signed) OSCAR CAIN,
United States Attorney.

(Signed) E. C. MACDONALD,
Assistant United States Attorney.

(Signed) E. W. BURR,
Special Assistant to U. S. Attorney.

Endorsements: Service of a Copy of the within Assignment of Errors is hereby admitted, at Conconully, Washington, this 26th day of September, 1912.

(Signed) SMITH & GRESHAM,
Attorneys for Defendants.

Assignment of Errors.

Filed September 20, 1912.

W. H. HARE, Clerk.

By S. M. RUSSELL, Deputy.

No. 1271.

In the District Court of the United States for the Eastern District of Washington, Northern Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

W. S. BENNETT and JOSEPHINE BENNETT,
his wife,

Defendants.

PETITION FOR APPEAL TO THE UNITED
STATES CIRCUIT COURT OF APPEALS,
FOR THE NINTH CIRCUIT, AND
ORDER ALLOWING SAME.

To the Honorable District Court of the United States
for the Eastern District of Washington:

The above named plaintiff, United States of America, conceiving itself aggrieved by the decree made and entered by said Court on the 13th day of August, 1912, in the above entitled cause, does hereby appeal from said decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors filed herein, and prays that its appeal be allowed, and that citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, California.

Dated this 20th day of September, A. D. 1912.

(Signed) OSCAR CAIN,

United States Attorney.

(Signed) E. C. MACDONALD,

Assistant United States Attorney.

(Signed) E. W. BURR,

Special Assistant to U. S. Attorney.

The foregoing petition of the plaintiff, United States of America, for an appeal to the United States Circuit

Court of Appeals for the Ninth Circuit, is hereby granted, and the appeal allowed.

Dated this 20th day of September, A. D. 1912.

(Signed) FRANK H. RUDKIN,
Judge.

Endorsements: Service of a Copy of the within Petition for Appeal and Order Allowing Same, is hereby admitted, Conconully, Washington, this 26th day of September, 1912.

(Signed) SMITH & GRESHAM,
Attorneys for Defendants.

Petition for Appeal and Order Allowing Same.

Filed Sept. 20, 1912.

W. H. HARE, Clerk.

By S. M. RUSSELL, Deputy.

No. 1271.

In the District Court of the United States for the Eastern District of Washington, Northern Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

W. S. BENNETT and JOSEPHINE BENNETT,
his wife,

Defendants.

CITATION (Lodged Copy).

UNITED STATES OF AMERICA—ss.

THE PRESIDENT of the United States to W. S. Bennett and Josephine Bennett, his wife, GREETING:

YOU ARE HEREBY CITED AND ADMONISHED to be and appear at the United States Circuit

Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, State of California, within an appeal filed in the office of the Clerk of the United thirty (30) days from the date of this writ, pursuant to States District Court for the Eastern District of Washington, Northern Division, wherein the United States of America is appellant, and you, the said W. S. Bennett and Josephine Bennett, are appellees, to show cause, if any there be, why the decree in the said appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS, THE HONORABLE EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States of America, this 20th day of September, A. D. 1912, and in the Independence of the United States the one hundred and thirty-seventh.

(Signed) FRANK H. RUDKIN,
United States District Judge for the Eastern District of Washington.

(Seal.) (Signed) W. H. HARE,
Clerk of the United States District Court for the Eastern District of Washington.

Endorsements: Service of a copy of the within Citation is hereby admitted at Conconully, Washington, this 26th day of September, 1912.

(Signed) SMITH & GRESHAM,
Attorneys for Defendants.

Citation (Lodged Copy).

Filed September 20, 1912.

W. H. HARE, Clerk.

By S. M. RUSSELL, Deputy.

In the District Court of the United States for the Eastern District of Washington, Northern Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

W. S. BENNETT and JOSEPHINE BENNETT,
his wife,

Defendants.

To the Clerk of the United States District Court for the Eastern District of Washington:

YOU ARE HEREBY DIRECTED, in making up your return to the citation on appeal herein, to include therein the following:

Complaint;

Answer;

Replication;

Testimony;

Opinion;

Decree;

Assignment of Errors;

Petition for Appeal, and Order Allowing Same;

Citation;

Admission of Service of Copy of Proposed Bill of Exceptions;

which comprise all of the papers, records and other proceedings which are necessary to the hearing of the appeal in said action in the United States Circuit Court of Appeals, and no other papers, records or other proceedings than those above mentioned need be included by you in making up your return to said citation as a part of such record.

Dated this 11th day of October, A. D. 1912.

(Signed) OSCAR CAIN,
United States Attorney.

(Signed) E. C. MACDONALD,
Assistant United States Attorney.

Endorsements: Praecipe for Transcript of Record.
Filed Oct. 12, 1912.

W. H. HARE, Clerk

By F. C. NASH, Deputy.

No. 1271.

*In the District Court of the United States, Eastern Dis-
trict of Washington, Northern Division.*

UNITED STATES OF AMERICA,

Appellant,

vs.

W. S. BENNETT and JOSEPHINE BENNETT,
his wife,

Appellees.

STIPULATION.

It is hereby STIPULATED and AGREED by and
between the parties hereto that the appellant may have
to and including the first day of November, A. D. 1912,
in which to print and file the transcript on appeal herein.

Dated this 7th day of October, 1912.

(Signed) OSCAR CAIN,
United States Attorney.

(Signed) E. C. MACDONALD,
Assistant United States Attorney.

(Signed) SMITH & GRESHAM,
Attorneys for Appellees.

Endorsements: Stipulation Extending Time to

Print and File Printed Record on Appeal.

Filed October 12, 1912.

W. H. HARE, Clerk.

By FRANK C. NASH, Deputy.

No. 1271.

In the District Court of the United States, Eastern District of Washington, Northern Division.

UNITED STATES OF AMERICA,

Appellant,

vs.

W. S. BENNETT and JOSEPHINE BENNETT,
his wife,

Appellees.

STIPULATION.

It is hereby STIPULATED by and between the parties hereto, by their respective attorneys, that the United States of America, appellant in said cause, may have to and including the 15th day of November, A. D. 1912, in which to serve and file the transcript on appeal herein.

Dated this 21st day of October, A. D. 1912.

(Signed) OSCAR CAIN,

United States Attorney,

(Signed) E. C. MACDONALD,

Assistant United States Attorney.

(Signed) SMITH & GRESHAM,

Attorneys for Appellees.

Endorsements: Stipulation extending time for printing record until November 15, 1912.

Filed October 24, 1912.

W. H. HARE, Clerk.

By FRANK C. NASH, Deputy.

In the District Court of the United States, Eastern District of Washington, Northern Division.

No. 1271.

UNITED STATES OF AMERICA,

Complainant,

vs.

W. S. BENNETT and JOSEPHINE BENNETT,
his wife,

Defendants.

CLERK'S CERTIFICATE TO TRANSCRIPT OF
RECORD.

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF WASHINGTON—ss.

I, W. H. Hare, Clerk of the District Court of the United States for the Eastern District of Washington, do hereby certify the foregoing printed pages, numbered from 1 to 253, inclusive, to be a full, true, correct and complete copy of so much of the record, papers, testimony and other proceedings in the above and foregoing entitled cause as is called for by the complainant and appellant in its praecipe therefor as the same appears on page 250 of this printed record, and as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the record on appeal from the order, judgment and decree of the District Court of the United States for the Eastern District of Washington, Northern Division, to the Circuit Court of Appeals for the Ninth Judicial Circuit, San Francisco, California.

I further certify that I hereto attach and herewith transmit the Original Citation issued in this cause.

I further certify that the cost of printing the foregoing transcript is the sum of \$261.00.

I further certify that the fees of the Clerk of this Court for preparing, supervising and certifying to the foregoing printed record, under Rule 101 of the Rules of this Court, amounts to the sum of \$134.20, which sum will be included in my quarterly account as Clerk against the United States for the quarter ending December 31, 1912.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court at Spokane, in said District, this 8th day of November, 1912.

(Signed) W. H. HARE,

(Seal)

Clerk.

3

IN THE
United States Circuit Court of Appeals
FOR THE
NINTH CIRCUIT.

UNITED STATES OF AMERICA,
Appellant,

vs.

W. S. BENNETT and JOSEPHINE
BENNETT, His Wife,
Appellees.

APPELLANT'S OPENING BRIEF

UPON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN
DISTRICT OF WASHINGTON,
NORTHERN DIVISION.

OSCAR CAIN,
United States Attorney.
EDMOND J. FARLEY,
Assistant United States Attorney.
E. W. BURR,
Special Assistant
to the United States Attorney.
Attorneys for Appellant.

STATEMENT OF THE CASE.

This is an appeal from the decree of the United States District Court for the Eastern District of Washington, in a suit in equity brought to restrain appellees from diverting an amount of water in excess of two and one-half ($2\frac{1}{2}$) acre feet per annum for the irrigable portion of the lands described in paragraph six (6) of the bill of complaint.

In the year 1905, under the provisions of the Reclamation Act of June 17, 1902 (32 Stat. L. 388), and the Act of the Legislature of the State of Washington, Approved March 4, 1905 (Laws of 1905, p. 180), the United States appropriated all of the unappropriated waters of Salmon River in the County of Okanogan, State of Washington.

Prior to that date appellees and their predecessors in interest appropriated and diverted a part of the waters of said Salmon River for the purpose of irrigating and reclaiming their lands. On February 15, 1912, appellant began a suit in the United States Court for the Eastern District of Washington to restrain appellees from using a greater amount of water than was necessary for the irrigation of said lands, alleging that, of the lands described in paragraph six, fifty acres are irrigable; and that two and one-half ($2\frac{1}{2}$) acre feet per annum of water is sufficient to properly irrigate the same.

Appellees contend that sixty-two and 82-100 acres of said lands are irrigable; and that two cubic feet

per second of time are necessary for the successful growing of crops upon said lands.

The Court, after hearing the testimony and evidence, found that appellees are entitled to use water upon sixty-two and 82-100 acres, and that appellees are entitled to the use of one and one-half ($1\frac{1}{2}$) cubic feet per second of time for a season of five months, to-wit: from April 15th to September 15th, of each year; or, what is equivalent to seven and three-tenths ($7\frac{3}{10}$) acre feet per acre.

SPECIFICATION OF ERRORS.

The Court erred—

FIRST: Because the defendants are awarded a greater amount of water than is necessary, with due economy, for the irrigation of their lands.

SECOND: Because the decree is based upon an erroneous ruling of the Court, that the defendants are entitled to use and maintain the same means employed by them in conveying water to their land and the application of said water thereon, that they had employed at the time of acquiring rights to said water, irrespective of whether such means employed by them was productive of due economy in the use of water.

THIRD: Because said decree was based upon a ruling of the Court that the defendants are entitled to as much water as was used by them in accordance with the usual course of husbandry in the district in which their lands are situate, irrespective of whether or not such usual methods of husbandry are in accordance with due economy in the use of water.

FOURTH: Because said decree awards the use of water to the defendants during a longer irrigation season than is shown to be necessary.

FIFTH: Because the Court awarded defendants a greater quantity of water than is necessary for growing the principal crop of the country; and declined to enter a decree awarding, in the alternative, water sufficient for the growth of alfalfa, or for orchard purposes, accordingly as the lands under consideration might be devoted to such usage.

SIXTH: Because said decree is contrary to the evidence as to the amount of water necessary for the cultivation of defendants' land.

SEVENTH: Because said decree award to defendants vested rights in the water in controversy in excess of their necessities, the title to said water being in the public, under police powers of regulation, to be exercised with the view of obtaining the greatest possible use of the same.

ARGUMENT.

LOCATION OF APPELLEE'S LAND AND CONDITION OF THE SOIL.

Although appellant makes several assignments of error, they all resolve themselves into one question—did the Court allow appellees more water than is necessary for the irrigation of their land. We will therefore not attempt a separate discussion of the assignments.

Before proceeding with the argument of the facts and the law in this case, it is important that we

consider briefly the questions of the location of appellees' land and the condition of the soil with a view to ascertain the amount of water necessary to properly irrigate the same.

It appears that appellees' land is located in a valley, with steep hills on both sides. It is a body of land about a mile long and varying from fifty to seven hundred feet wide. (Transcript p. 48). It also appears from the testimony that there is seepage to the land from the hills; that is, that land situated as this is next to the hills, there is seepage from the mountains which tend to supply moisture, whereas the same amount of bench land would require more water to irrigate it. (Trans. p 48). There seems to be some coulees either leading to, or upon appellees' land, in which there are three or four springs (Trans. p. 49), which, in like manner, makes it possible to irrigate with less water than is required for the average land; and the annual rainfall is shown to be over 11 inches.

Upon appellees' land there is a marsh in which water stands almost continuously; a marsh covering over twenty acres of land. (Trans. pp. 34-122). The highest point of appellees' land lies less than fifteen feet above the marsh, and one-third of their land lies less than four feet above the surface of the water in the marsh. It appears also that in the summer, during the irrigation season, the water runs out from the marsh at the rate of about one cubic foot per second of time. (Trans. pp. 34-110). The testimony also shows that there is a well in which the water stands

or raises to within five or six feet of the surface of the ground. (Trans. p. 127).

All this would indicate one of two things—either the land is supplied with an abundance of moisture by nature; or, that an excessive amount of water is permitted to flow upon the land, either by over-irrigating or by wild flooding. It is generally known of alfalfa, which is appellees' principal crop, that the roots of the alfalfa will go to a considerable depth down to the moisture. If it is true that the water stands in the marsh almost continuously and to the extent that the water flows from it at the rate of one cubic foot per second, which is not denied; and that the water stands in the well within five or six feet of the surface of the ground, which would bring the water plane within about four feet below the surface of the land; if all these things are true, it is evident that the land is not such as would require an excessive amount of water to properly irrigate it, but on the contrary, as has been testified to, would require less than the ordinary land. (Trans. p. 54).

As to the nature of the soil there is a wide range in the testimony. Appellant's witnesses say that it is in part volcanic ash and the balance is a good, substantial soil. Appellees' witnesses say that it is, in the main, a good loam ranging from 12 to about 15 inches deep, underlaid with a strata of gravel of from 6 to about 24 inches; and all of appellees' witnesses seem to agree that beneath the gravel there is a gumbo sub-soil.

Taking even the best construction that can be placed on the testimony of appellee's witnesses, even in the absence of the favorable conditions surrounding the land, it must appear evident that the soil is not such as would require an excessive amount of water; and, when we consider the location of the land, the marsh on the land from which the water flows at the rate of one cubic foot per second, and the fact that the water plane is within about four feet of the surface of the land, when we consider all of these things it is evident that the land can be irrigated with an amount of water much less than the ordinary land.

AS TO THE DUTY OF WATER IN GENERAL.

Appellant makes no contention against the Court's finding as to the number of acres upon which appellees are entitled to use water. What it does contend is that the Court erred in allowing appellees an amount of water in excess of their actual needs as tested by economical methods of irrigation.

As to the duty of water, we believe an examination of the records will disclose a great preponderance of the evidence in favor of the duty of water contended for by the Government.

The testimony of witness Bonstedt (Trans. p. 50) is to the effect that for growing crops of forage, two and one-half ($2\frac{1}{2}$) acre feet are necessary on volcanic ash soil and four and one-half acre feet are sufficient on sandy soil; and that he would class defendants' land as volcanic ash soil.

Witness Castile (Trans. p. 82) states that under the Sunnyside project three acre feet are sufficient for

the successful growing of alfalfa; and that more water is required on the Sunnyside project than on defendants' land.

Witness Hendrick (Trans. p. 91-92), who farms in the vicinity of defendants' land, says that he can raise good crops of alfalfa on two and one-half ($2\frac{1}{2}$) acre feet.

Witness George (Trans. pp. 108-109) farms volcanic ash soil, in the vicinity of defendants' land, underlaid with gravel, boulders and sand, and grows good crops of alfalfa on two and one-half ($2\frac{1}{2}$) acre feet.

Witness Shull (Trans. pp. 108-109) farms land in the vicinity of defendants' land, and with three acre feet at the intake of his ditch, and two and one-half acre feet at the point of application, grows good crops of alfalfa; and thinks that his land requires more water than does defendants'.

Laughlin McClain (Trans. pp. 114, 115, 116, 117) is a constructor of irrigation systems; is familiar with the duty of water under several irrigation systems, where climatic and other conditions are similar to those which surround defendants' land, and states that the duty of water in other places is as follows: Under the Methow project one cubic foot to 100 acres; under the Fruitland project, one cubic foot to 160 acres; under the Wenatchee project, one cubic foot to 100 acres.

It will be observed that all of the witnesses above referred to base their estimate upon actual experience in the use of water for irrigation upon lands of the same character as those of appellees and surrounded

by similar climatic conditions. The witnesses for appellees on the contrary merely give an opinion that the duty of water contended for by the government is insufficient. We do not recall a single one who testified that he had made actual examination to determine that a less amount of water would not suffice.

For the purpose of casting a little light on the question of the amount of water necessary to properly irrigate lands, we quote the following from the statutory enactments of other states, to-wit:

In Idaho, one second foot for each fifty acres. (Session law 1903, page 233, sec. 9, as amended laws of 1905, page 174).

In Nebraska, one cubic foot per second for each seventy acres of land. (Session laws 1911, page 505, sec. 19).

Nevada, three acre feet per annum. (Sec. 5, Act of February 26, 1907).

New Mexico, one cubic foot for each eighty acres. (Act of March 1st, 1905, sec. 49).

Wyoming, one cubic foot per second for each seventy acres. (Wyoming Stat. 1910, sec. 777).

North Dakota, one second foot for each eighty acres. (Act of March 1st, 1905, sec. 49).

The above statutes fixing the maximum to be used will give the Court some idea about the amount of water which is deemed sufficient in other jurisdictions; and, the testimony of the witnesses in this case shows that the duty of water on other projects and other places in Washington is, as placed by appellant's witnesses, from two and one-half to three acre feet,

and that appellees' land is such as would require less than the ordinary lands; while, in this case, the Court has decreed to appellees one and one-half cubic feet of water per second of time, during a season of five months, to-wit: from April 15th to September 15th, which is equivalent to seven and three-tenths acre feet per acre—an amount greatly in excess of what is required.

AS TO THE LENGTH OF THE IRRIGATION SEASON.

In addition to awarding the appellees one and one-half cubic feet of water per second of time, the Court by its decree (Trans. p. 242) adjudged the irrigation season to be from April 15th to September 15—a season of five months. This, we contend, is not supported by the evidence.

Witness Muldrow, who is an irrigation engineer, fixes the season at four months (Trans. p. 44); witness Bonstedt gives it as his opinion that irrigation is not necessary either in April or September; that is, that water is required only during a season of four months (Trans. pp. 60-61); witness George raises three crops of alfalfa, irrigating from April 25th to July 21st (Trans. pp. 98-99); and, generally, throughout the entire record there is a total lack of evidence to support a longer irrigation season than four months, or during May, June, July and August.

The length of the season is important when we consider that the continuous flow of one and one-half second feet for a period of 30 days would aggregate

90 acre feet, or sufficient, with losses in transmittal, for the irrigation of 30 acres of land annually, if stored by the reclamation service in its storage reservoirs for the use of the Okanogan project.

That the Court may regulate the irrigation season in order to guard against early and late irrigation, without resulting benefit, curtail the right to store water which would otherwise be used during the height of the irrigation season, is well settled.

"An appropriation awarded to a ditch may be limited not only as to volume by its carrying capacity, but also by time—that is, the use of water through it is limited by its carrying capacity, and as to duration by the necessity of the use—and it may also be restricted to some particular season or time of the year."

Windsor R. & C. Co. v. Lake Supply Ditch Co., 98 Pac. (Colo.) 734.

It is evident from the foregoing that the award to appellees should be cut down, not only as to the amount per second of time, but that the season should be shortened by about thirty days; that is, that the irrigation season should be adjudged to be from May 1st to September 1st.

APPELLEES CAN ACQUIRE NO RIGHTS TO WASTEFUL USE OF WATER.

From the evidence in this case it is apparent that appellees have been using wasteful methods in irrigation; and, due undoubtedly to their early training, find it difficult to unlearn some of the things they have learned. Appellees' methods are described by witness

Muldrow (Trans. p. 33) "As wild flooding; that is, the water is simply turned out and allowed to flow in a general direction down across the land without any system of levees or regular furrow system." He says further (Trans. p. 34): "Well, Mr. Bennett's land lies in a coulee which is similar to the typical coulee in this country and slopes toward the center, and in the center there is a swamp of about fifteen acres or so, where the water stands in the irrigation season and runs off there and through a drain down at the lower end." Appellee W. S. Bennett, regarding his methods, testifies as follows (Trans. p. 205): "I don't believe there ever was a man that irrigated in his life but what at times has wasted water. * * *

I have left it at times run into that swamp right close to that swamp there is a little piece of land—there is some alkali on it—I flushed that piece of land quickly—what we call flushed it—run water over it quickly—to get that tall rank start of the first crop of alfalfa. After you get the first crop started it goes good. I flushed it, let the water run right into that swamp; that is when I first came in there and that is the way I was accustomed to irrigate." After testifying that he had done away with the levee system on his land (Trans. p. 207), he says: "It requires—it is more trouble to me to irrigate that way—it is more bother to be made that way." Again, speaking of the amount of water necessary to irrigate (Trans. p. 204), he says: "Well, I don't believe any one irrigator can irrigate it with less than an inch to the acre; it has got to be—another thing, you can't irrigate it

western style and irrigate it. You can't get up at 9 o'clock in the morning and get your breakfast late, and get out and change your water, and quit early in the evening and go to town between times and irrigate that with an inch. A great many people irrigate and have pleasures; I can't do it." From the foregoing it is evident that appellees' methods are wasteful; and, unless they have acquired a vested right in any manner of use, water cannot be awarded to them on any such basis.

The Court at the conclusion of the trial said: "I am going to award these defendants just what I think they are entitled to under the state law before they went in there, and not impaired to any extent by subsequent legislation, and I think that question is fairly well settled by the Supreme Court decisions of the state." (Trans. p. 238). From this it is evident that the Court assumed and acted upon the theory that appellees' rights to the use of water were different prior to the time they went in there than at the present time. The Court evidently assumed that whereas the appellees were then permitted to use a large amount of water they can now use the same amount. We submit that such is not the law.

It is fundamental that water flowing in a natural channel is not the subject of private ownership. The only private right that may attach to water so flowing is the right of use, and the right of use may be regulated by the sovereign authority, which may also prescribe the character, quantity and extent of the use which may be acquired therein. The right to

the use of water throughout the west is limited to beneficial purposes. No one can acquire a right to divert from all common public source more water than he can use beneficially by reasonably economical methods, and with a due regard for the rights of others.

If any individual has at any time, whether now or in the past, used more water than he could put to beneficial use it was, not because he had any right to any more water than was reasonably necessary, but because he could use it without infringing upon the rights of others; it was merely permissive, as will appear from the following authorities. Independent of statutory provisions the Courts have almost universally held that the right to the use of water is limited to the beneficial use.

Kinney on Irrigation & Water Rights (1912, 2nd Ed. at page 1541, says:

"As the population of this western country has increased and the demand for water has correspondingly increased, the principle of 'beneficial use' is becoming each year in all jurisdictions more and more strictly enforced. More stringent regulations may still be made in certain jurisdictions, which will benefit not only those who at present have water rights in certain streams, but also those subsequent who need the water and desire to appropriate sufficient for their purposes. There are many appropriators who still demand the amount of water claimed by them at first, although the amount is many times more than was originally or is now needed by them for the purpose to which they apply it. At an early day, and when they first made the appropriation, the settlers had no knowledge whatever of the proper amount of water necessary to irrigate certain tracts of land; and there

was at that time an entire absence of written authority from which they could learn, and water then being plentiful, it followed, as a matter of course, that the settlers claimed extravagant amounts, and also used very wasteful methods in the diversion and use of it."

Continuing at pages 1612-13, the same author, after stating that the ever-increasing demand upon the water supply makes an increase of the water supply improbable, says:

"A more economical use of the available supply and an entire suppression of the wasting of water are, then, the only ways in which new fields and new orchards may be provided for; but this must be done without injury to the rights of those who are at present using the water. But as an appropriator acquires no title to the *corpus*, or *very body of the water*, and only acquires a right to the use of such a quantity of water within the extent of his appropriation as he can use economically and without waste, he can not lawfully acquire a right to an excessive amount of water for the purpose for which he appropriates it, nor can he acquire a right to use the water in a wasteful manner and thereby deprive others from its use."

In *Hough v. Porter*, 98 Pac. 1102, the Court says:

"In this arid country such manner of use must necessarily be adopted as will insure the greatest duty possible for the quantity available. *Van Camp v. Emery*, 13 Idaho, 202, 89 Pac. 752; *Anderson v. Bassman* (C. C.) 140 Fed. 14, 27. The wasteful method so common with early settlers can, under the light most favorable to their system of use, be deemed only a privilege permitted merely because it could be exercised without substantial injury to any one; and no right of such methods of use was acquired thereby. Owing to the little demand and large proportionate supply in use by those along Silver creek and its branches in the early 80s, together with the lack of

general knowledge and experience on the subject throughout the state, wasteful methods at that time were, no doubt, common; but of recent years improved means throughout the West have come into use, and a scarcity of the supply has made a more economic use necessary. *The result is that the law has become well settled that beneficial use and needs of the appropriator, and not the capacity of the ditches, or quantity first applied, is the measure and limit of the right of such appropriators.* Kinneg, Irr. 30; Long, Irr. secs. 54, 55; Wiel, Water Rights p. 263; Seaward v. Pacific Light Co., 49 Or. 157, 88 Pac. 963; Gardner v. Wright, 49 Or. 609, 91 Pac. 286; Union Mill Co. vs. Dangberg (C. C.) 81 Fed. 73, 119; Anderson v. Bassman (C.C.) 140 Fed. 26."

The case of Shafford v. White Bluff etc. Co., 63 Wash. 10, is a most interesting as well as instructive case. In that case the question involved was the right of the user of water under a contract to insist upon any manner of use. Reading at page 14, Chadwick, J., says:

"Neither must it be held, in the strict sense, that any one has a right to use water at will. Flowing waters are free to all, and only so far as sanctioned by custom or statute may they be put to private uses. While the cry 'There is land for all' has sustained us in our disposition of the public domain, we are met at the outset of our irrigation policies by the fact that there is not, and probably never will be, even with perfect practice, water for all. It has been said that, 'The forest and water problems are perhaps the most vital internal question in the United States.' Newell, chief of the division of hydrography of the United States Geological Survey, in his work on Irrigation, notes the fact that there has been but little progress in the practice of irrigation, 'due largely to the fact that the men who are now bringing in the

lands under ditch have for the most part received their training as farmers in the humid regions, and find it difficult to unlearn many facts which they regard as fundamental.' "

Quoting further from Newell (page 216), he says:

'With the gradual development of the country and the bringing of more and more land under ditches, the need for water increases, and equity demands that no irrigator take more than he can put to beneficial use. Flowing water must be considered as a common fund, subject to beneficial use by individuals according to orderly rules, each man taking only the amount he can employ to advantage. Under any other theory full development of arid regions is impossible.'

Again quoting from the same author (page 215), he says:

'The farmers, being accustomed to the use of large quantities of water, often find it exceedingly difficult to get along with less and continue to use excessive amounts, often to their own disadvantage * * * Some of them actually waste water to their own detriment from the mistaken belief that in so doing they are establishing a perpetual right to certain quantities.'

The foregoing authorities show conclusively that unless the Courts establish and maintain the rule contended for by appellant that progress is impossible. Granting that appellees' rights relate back to the time of the appropriation, yet it is clear that they did not then, any more than they now have the right to use any more water than they could put to a beneficial use.

USE OF WATER A SUBJECT OF POLICE REGULATION.

The doctrine of beneficial use of water, as is plainly shown by the foregoing authorities, is well settled in the western states. The subject, however, is of such great importance that almost every state in the arid regions of the West has exercised its police power in regulating its use.

This exercise of the police power is universally sustained by the Courts, not only with reference to rights acquired subsequent to the passage of the law, but also with reference to rights previously vested. If it were otherwise it would do away with the right of the sovereign to insist upon an economical use of water. The early settler, when but few persons were making demands upon the water supply, might irrigate by wasteful and extravagant methods; and if, after the country is settled and the water needed for beneficial use by others, they may by pursuing these methods deprive other settlers of water, it would mean that the early settler can acquire the right by prescription to waste the water of the common supply. Such is not the law, and on this point we cite a few authorities.

The case of *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, is a very well considered case. In 1908 the legislature of New York passed an act for the protection of natural mineral springs of the state and to prevent the waste of the state's natural mineral waters. The statute was attacked upon the ground that it violated the 14th amendment in that it deprived

the gas company of its property without due process of law. Quoting from the case of *Ohio Oil Co. v. Indiana* (177 U. S. 190), reading at page 75, the Court says:

"They (meaning the surface owners) could not be absolutely deprived of this right which belongs to them without a taking of private property. But there is a coequal right in them all to take from a common source of supply the two substances which, in the nature of things, are united, though separate. It follows, from the essence of their right and from the situation of the things as to which it can be exerted, that the use by one of his power to seek to convert a part of the common fund to actual possession may result in an undue proportion being attributed to one of the possessors of the right, to the detriment of the others, or by waste by one or more, to the annihilation of the rights of the remainder. Hence it is that the legislative power, from the peculiar nature of the right and the objects upon which it is to be exerted, can be manifested for the purpose of protecting all the collective owners by securing a just distribution to arise from the enjoyment by them of their privilege to reduce to possession and to reach the like end by preventing waste. * * * Viewed, then, as a statute to protect or to prevent the waste of the common property of the surface owners, the law * * * which is here attacked because it is asserted that it divested private property without due compensation, in substance, is a statute protecting private property and preventing it from being taken by one of the common owners without regard to the enjoyment of the others."

Again, speaking of the pumping operations in obtaining mineral water, reading at page 77, the Court says:

"Thus these pumping operations generally result in an unreasonable and wasteful depletion of the com-

mon supply and in a corresponding injury to others equally entitled to resort to it. It is to correct this evil that the statute was adopted, and the remedy which it applies is an enforced discontinuance of the excessive and wasteful features of the pumping. It does not take from any surface owner the right to tap the underlying rock and to draw from the common supply, but, consistently with the continued existence of that right, so regulates its exercise as reasonably to conserve the interests of all who possess it. That the state, consistently with due process of law, may do this is a necessary conclusion from the decision in the case cited. But were the question an open one we still should solve it in the same way."

The legislature of the state of Washington has expressed the public policy of the state in very explicit terms on the subject of conservation of its public waters. Section 6346 Rem. & Bal. Annotated codes reads as follows:

"During the irrigation season it shall not be lawful for any person to run any greater quantity of water through his irrigating ditch than is absolutely necessary for irrigating his land, or the land of other persons, as provided for in section 6380, and for domestic and stock purposes. And any person who shall wilfully violate the provisions of this section shall be deemed to be guilty of a misdemeanor, and upon conviction thereof shall be fined in an amount not less than one hundred dollars nor more than one thousand dollars, which fine shall go into the county school fund of the county in which the offense is committed."

Exercise of police powers with regard to previously acquired water rights was in issue in the case of *White v. Farmers' Highline Canal & Reservoir Co.*, 43 Pac. (Colo.) 1028. The Court, after holding that the regulation of the use of water was a valid exercise

of police power, and citing the Sinking Fund Cases, 99 U. S. 700 and *Beer Co. v. Mass.* 97, U. S. 25, turns to the consideration of the objection that the contract under which the defendant claimed, was executed prior to the passage of the act exercising police power. It was held that the prior rights of the parties were subject to regulation and control under the terms of the act of the state legislature passed subsequent to the acquisition of the title to the water rights. Reliance was had on the case of *Fertilizing Co. vs. Hyde Park*, 97 U. S. 659, and numerous other United States Supreme Court and New York cases.

Wiley v. Decker, 73 Pac. 210.

Montezuma Canal Co. v. Smithville Canal Co., 218 U. S. 371.

Nash v. Clark, 75 Pac. 371-374; affirming 198 U. S. 361.

Even though it could be said that the rights of appellees were then different from that which they now possess, yet it is evident from the foregoing that the state by the exercise of its police power could regulate the manner of use and prevent the waste of its public waters.

CONCLUSION.

In conclusion will say that we have shown that appellees' land is favorably situated for easy irrigation, between the mountains from which there is a seepage; that in the center of the land there is a swamp from which water flows during the irrigation season at the rate of one cubic foot per second of time; that

the water plane is within about four feet of the surface of the ground; that the soil is of such a nature that it can be easily irrigated; and, we have seen that the duty of water in that country, upon lands less favorably situated, is from two and one-half to three acre feet per acre, and that in other states the maximum is fixed by statutes at about the same amount; so that, taken altogether, it is plain that appellees' land can be properly irrigated with not to exceed two and one-half acre feet, and yet the Court has awarded to appellees one and one-half cubic feet per second of time for a season of five months, which, by adding the annual rainfall of over eleven inches, is equivalent to over eight acre feet per acre, or more than double the duty of water in any other place.

Keeping in mind the swamp in the center of the land and the flow of water therefrom, we cannot escape the conclusion that the land is either supplied with a great deal of moisture by seepage or otherwise, or that appellees methods are wasteful; and, if the former, it is evident that the land needs but a small amount of water to properly irrigate it, and, if the latter, it is the duty of the Court to prevent such waste to the end that others may put the same to beneficial use.

We have seen that appellees' methods of irrigation are wasteful; they are described by witnesses as wasteful, and appellee Bennett himself by his testimony shows that they are wasteful; but he says: "That is the way I am used to irrigate, it is less bother." If the Courts in determining the amount of water to

be awarded to any given appropriator are to consider the methods, then progress is impossible. The water supply is limited, the demands for water is increasing, and, if the irrigator who in the early days was permitted to use wasteful methods because he could do so without interfering with the rights of others and thereby acquires a right to the use of a greater amount of water than is reasonably necessary to the proper irrigation of his land, it is evident that he thereby acquires the right to waste water—which cannot for one moment be sanctioned by the law.

It does not mean that the Courts should compel individuals to use any particular method, but it does mean that he shall not use wasteful methods at the expense of others. The Court, having considered the nature of the soil and all other circumstances surrounding the land, should award to an irrigator an amount of water sufficient to irrigate his land such as would be needed by an irrigator of ordinary skill and by reasonable methods: then, if he desires to use methods which are wasteful, the loss will be his and shall not fall upon others. He, after using his methods, should not be permitted to come into Court and insist that he has acquired a right to waste water because twenty years ^{ago} he did so.

But it may be said that the Court has not considered appellees' methods in making the award. If that be true, then the amount awarded by the decree must be cut down, either by cutting down the per second flow, or the length of the season, or both; for under no other theory could the decree be permitted to stand. It cannot be seriously contended that, con-

sidering the duty of water in the western states generally, the duty in the state of Washington, and the duty in the locality of appellees' land, that the doctrine of beneficial use demands an award to appellee's of one and one-half cubic feet per second of time, or what is equivalent to seven and three-tenths feet, which taken with the annual rainfall, amounts to over eight acre feet per acre, and this when it is plain from the evidence that on lands less favorably surrounded than appellees the duty is not to exceed from two and one-half acre feet.

We submit that the amount of water awarded to appellees by the decree of the Court must be cut down by at least one-half by cutting the per second feet and the length of the season.

Respectfully submitted,

OSCAR CAIN,
EDMOND J. FARLEY,
E. W. BURR,

6

IN THE
UNITED STATES CIRCUIT COURT
OF APPEALS

FOR THE
Ninth Circuit

UNITED STATES OF AMERICA,

Appellant.

— vs. —

W. S. BENNETT AND JOSEPHINE BENNETT,
HIS WIFE,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION.

HON. FRANK H. RUDKIN, JUDGE.

APPELLEES' OPENING BRIEF.

P. D. SMITH, CONCONULLY, WASHINGTON,

Attorney for Appellees.

STATEMENT.

Salmon Creek has its rise and flow in Okanogan County, Washington. This case involves, not the **RIGHT**, of appellees to use the waters of this stream for irrigation and domestic purposes, but rather the **EXTENT**, to which they are entitled to use them.

The waters of this stream were actually appropriated and applied to a beneficial use on the lands of appellees in the year 1887 (**Record**, p. 189) by Nathan Smye (not Smyth), the immediate grantor and predecessor in interest of appellees; and they have been used for irrigating said lands continuously since said date. In the interest of time, most of the proof in respect to this title was dispensed with by stipulation, found on page 120 of the **Record**, and is as follows:

“**Mr. SMITH:** It is stipulated and agreed, as I understand it, between the plaintiff and defendant in this case, that the defendant has a prior right over the plaintiff to the use of the water in Salmon Creek for all the land that they irrigated by actual diversion and use, and that that use has extended over a period of more than ten years prior to the commencement of this action, except as to the patch of ground that has been referred to, and will be referred to as the rocky ground, that tract to remain open to proof as to the time on which water has been used, if at all.

“**Mr. CAIN:** It is satisfactory with the qualification that they are entitled to the use of so much as can be used by economical methods.

“THE COURT: According to the usual course of husbandry in that country.”

The area of the rocky land referred to in the stipulation is a little less than thirteen acres, making appellees' total area to be irrigated from Salmon Creek 62.82 acres.

It might be well to fix in our minds at this time the fact that the Government made its appropriation of the surplus waters of said creek in the year 1905. By turning to page 201 of the Record, we find that appellees have irrigated that rocky ground every year since they have been in the country—1902. This testimony is not disputed; and the honorable trial judge finds it as a fact in his opinion in this case. This brings the whole of appellees' 62.82 acres ahead of the Government's appropriation.

We are now introduced to the ultimate inquiry in this case: How much water are the appellees entitled to use to meet the requirements of their prior appropriation?

ARGUMENT.

Assignments of Error I and VI.

It seems to us that these two assignments are identical, and for that reason would ask the liberty to discuss them jointly. These two assignments allege that the appellees were awarded a greater amount of water than is necessary to satisfy the requirements of their prior appropriation. The question presented is solely one of fact. The character and requirements of appellees' lands are well summarized by the Court in its opinion at page 240, thus:

“The testimony clearly shows that the defendants’ land has a gravelly, porous sub-soil and requires an unusual quantity of water to properly irrigate it. The crops grown by the defendants, consisting of alfalfa and timothy and clover, also require a greater quantity of water than do orchards and other crops that might be mentioned.”

We contended for one miner’s inch per acre under a six inch pressure, measured at the land. We caused the land and soil to be examined and tested by six different people, four of them engineers, and all practical irrigators except two. In addition to these are the witnesses Munson and Carpenter, who for years have been living on and irrigating lands adjoining those of Mr. Bennett. All of these men, eight in number, place Mr. Bennett’s needs at not less than one miner’s inch per acre, under a six inch pressure, at the land. Notwithstanding this, instead of allowing us 63 inches at the land, the court allowed us what is equal to about 60 inches at the intake, requiring us to carry the water nearly two miles through an open ditch, and in which the loss is admitted to be heavy. We recount briefly these facts merely to show that the evidence overwhelmingly supports the decree. That being true, under the familiar rule, the findings of the trial court will not be disturbed on appeal.

Assignments II and III.

We think these two assignments should also be considered together. They complain that the decree is based upon a ruling of the Court that the appellees are entitled to maintain the same methods of use em-

ployed by them before the Government acquired any rights, and in accordance with the usual course of husbandry in that part of the country. This is exactly what the court should have done, and had it done otherwise, it would have failed in applying the law.

In *Roeder v. Stein*, 23 Nev. 92, 42 Pac. 867, it is said:

“Conveying it through a ditch, even, will always cause some loss, and if the distance is great, or the soil loose or porous, the loss will be considerable. This, within any reasonable expense, is generally unavoidable. But, however this may be, if the appropriation has been made before others acquire rights in the stream, after that no change can be made to their detriment. The first appropriator must continue to use it in at least as economical manner as before, and cannot change the method of use so as to materially increase the waste.”

“In determining the amount of water which a user applies to a beneficial use, and to which he is entitled as against a subsequent appropriator, the system of irrigation in common use in the locality, if reasonable and proper under existing conditions, is to be taken as the standard, although a more economical method might be adopted.”

Wiel on Water Rights, (3d ed.) p. 509.

Rogers v. Pitt, 89 Fed. 420.

Rogers v. Pitt, 129 Fed. 932.

“In this case we have a large body of land which has been irrigated almost a lifetime. These old settlers took advantage of the United States

statute of 1866, authorizing settlers to acquire title to the use of water in this manner, and they have secured it, at least to the amount needed and used, and now an effort is being made to reduce the amount to which they supposed their title was perfect. Their methods of use have been those which were the least expensive, and, no doubt, to some extent extravagant, yet they cannot be expected to install methods now that might reduce to a minimum the amount of water necessary, at a cost that would absorb the profits. A great saving in the amount of water may be possible by adopting the Government Reclamation methods (cited as authority here) of cement ditches, to prevent both seepage and evaporation, with experts to follow and apply the water, by which it is contended that a half inch to the acre is sufficient; but at this time it is to some extent an experiment whether the investment on that basis will be remunerative, at least on the small farms. Furthermore, these government projects are for a new and an original use of water, upon which the government can impose such terms as it may see fit. Here the users have acquired the land and applied the water, which are valuable under present conditions, and their rights therein are vested, and we can require them only to use the water economically and reduce the quantity to a minimum by reasonable and cheap methods according to their situation and condition."

Little Walla Irr. Union v. Finnis Irr. Co.,
(Ore.), 124 Pac. 666.

But all this is begging the question. No witness has said that Mr. Bennett ever made any wasteful use of the water. There has been some intimation that his land is not in the best of condition for irrigation, but Mr. Muldrow, one of the Government's own witnesses, and formerly connected with the Reclamation Service, testified on that subject at page 34 of the Record as follows:

Q. Is Mr. Bennett's land properly leveled for irrigation in your judgment?

A. Its grades are not at all bad considering ordinary practice.

Mr. Bonstedt, another witness for the Government, and until recently, Project Engineer for the Government Okanogan Project, testified on page 55 as follows:

Q. Will you state the condition as to cultivation on the defendants' property, whether or not it is in proper shape for economical irrigation?

A. In my opinion, it is not in shape for high duty of water.

Q. It is in average shape for the Okanogan country?

A. Yes sir.

Q. The old-time water rights?

A. Yes sir.

Q. Or both?

A. It is in average shape for the method used in that country for irrigation.

On cross-examination, at page 65, he continues:

Q. I understood you to say that Mr. Bennett's place was not in very good shape for cultivation. Was that right? Did I understand you correctly?

A. I stated that it was in as good shape as any lands up there.

* * * * *

Q. Mr. Bennett is one of the very best farmers in that country, isn't he?

A. He is considered a very good farmer.

Mr. Bennett has been irrigating for twenty-five years — not theorizing and telling others how to irrigate, but actually irrigating, and we venture to say that by this time he knows something about it. Substantially all of his witnesses in this case were practical irrigators of long experience, and that is the kind of testimony the court wants.

Wiel, Water Rights, (3d ed.) 696.

Roberts v. Wilmarth, 40 Colo. 184, 95 Pac. 301.

Twaddle v. Winters, 22 Nev. 88, 85 Pac. 280, 89 Pac. 289.

Rogers v. Pitt, 129 Fed. 932.

After looking over the land and examining it they have said it will require one miner's inch per acre under a six inch pressure to irrigate it so as to produce crops to the best advantage. There has been no waste, and the trial court has not allowed for any, as will be seen from his opinion on page 241 of the Record, as follows:

"I think an allowance of one and one-half cubic feet per second of time, to be measured at the point of diversion from the river, if properly used and husbanded, will be ample to supply all the needs of the defendants," etc.

If anyone should complain of the decree in this case it is the appellees, but we have felt that we

received a fair and impartial trial, and at the hands of a just and able jurist. With this confidence, and the hope that the seven years of nagging and intimidation by local reclamation officials had come to an end, these old people were content to abide the judgment.

Assignment IV.

This assignment complains that the decree awards the use of water to appellees during a longer irrigation season than is shown to be necessary. This involves only a question of fact. In view of the fact that the courts take judicial knowledge of the climatic conditions of the country, it should not require much proof to convince the court that April 15th to September 15th is the irrigation season in this country, but the finding is amply supported. By turning to the testimony of Mr. Bonstedt at page 60 of the Record, we find the following:

Q. Are the farmers actually raising three crops of alfalfa in the Okanogan country without receiving water in April and September?

A. Well, they all apply it during those months.

Q. What is that?

A. They generally apply water during those months. I would like to modify that, during the first—during the last half of April and the first half of September.

When the farmers use the water is the very best evidence of the irrigation season.

Assignment V.

This assignment presents two questions. The

first relates to the quantity of water necessary for appellees' use. That feature has already been discussed. The second alleges error of the court in failing to enter a decree, "awarding in the alternative, water sufficient for the growth of alfalfa, or for orchard purposes, accordingly as the lands under consideration might be devoted to such uses." So far as we have been able to find, this is a question of first impression. We had supposed it to be well settled that a man who goes upon the public domain, constructs an irrigation ditch, diverts and applies the water to a beneficial use, acquires a vested right to the quantity of water beneficially used prior to the initiation of adverse rights; that the right is property in the highest sense; that the owner can change the place and manner of use, (so long as subsequent rights based thereon are not interfered with) or may sell it. Counsel for the Government appear to entertain the notion that if at some future time the lands of appellees should cease to be devoted to the growing of forage crops, and be planted to fruit, they would forfeit about half their water right—fruit requiring only about half as much water as forage crops. In other words, the Reclamation Service is saying to us: "If ever you go into the fruit business, we will take half your present water right and sell it." And it feels aggrieved that the trial court did not adopt that idea and determine in this action how much of appellees' right should be confiscated upon the happening of such an event. Such a decree would be very far reaching, and would hardly be in keeping with the constitution and laws of a country where property rights are supposed to be sacred. Such a blow at vested rights is so palpably

hideous as to make it unnecessary to prolong the discussion or cite authorities. If at some time the appellees should change to crops requiring less water, why not let them, the owners, sell the surplus, or apply it to other lands?

Assignment VII.

This assignment alleges error "because said decree awards to defendants vested rights in the water in controversy in excess of their necessities, the title to said water being in the public, under police powers of regulation, to be exercised with the view of obtaining the greatest possible use of the same." The errors here alleged are so blended with others already touched upon that we shall notice only that part which refers to vested rights and the police power.

Appellees' water right was acquired under Sec. 2339, Revised Statutes of the United States, which, so far as material to this inquiry, reads:

"Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same." * *

This section applies to water and ditch rights accrued since as well as before its passage.

Jacob v. Lorenz, 98 Cal. 335.

In applying that section, the Supreme Court of Washington, in the case of *Isaacs v. Barber*, 10 Wash. 124, said:

"Each of these propositions raises questions of the utmost importance, and we have given them such careful consideration as our opportunities would allow, and have come to the conclusion that this state, or at least that portion of it east of the Cascade mountains, was included within the territory where the right to prior appropriation of water for mining and other beneficial purposes was recognized by the courts and the law-making power, and that such right was established by a custom so universal that courts must take judicial notice thereof. We therefore hold that the right to prior appropriation as recognized by said act of Congress existed as a part of the laws and customs of the locality."

Again, in *Thorpe v. Tenem Ditch Co.*, 1 Wash. 566-569, it is said:

"It is the opinion of the court that the prior appropriator of the flow of any water over the public lands of the United States has a vested right therein."

We would not pass this case, however, without calling the Court's attention to the fact that it has been overruled in part by the later case of *Benton v. Johncox*, 17 Wash. 277, but not on the question above announced. To the same effect, see:

Wold v. May, 10 Wash. 157.

Offield v. Ish, 21 Wash. 277.

Benton v. Johncox, *supra*.

Authority could be multiplied indefinitely, but enough has been seen to show that it is the established rule in the State of Washington that a water right

acquired by prior appropriation is a vested right. That being true, the next inquiry is as to what effect the police power has on vested rights of this nature. At the outset, we might suggest that the police power in cases of this kind rests in the state and not in the United States. The State of Washington has made no police regulations affecting the case at bar, but even if it had, it is not competent for the state to invade vested rights under the guise of police power.

Speaking of the police power of regulation, Mr. WIEL, in his work on *Water Rights* (3d ed.), p. 1103, Sec. 1193, says:

“As it is true of administrative officers generally, irrigation or water officials cannot authorize acts injuring existing owners; their action is invalid where it has that effect. They cannot cut down the vested rights of prior appropriators or put them to unnecessary inconvenience to suit the benefit of subsequent appropriators. Their authorization cannot legalize a wrong upon existing claimants, nor abridge their rights.”

To support the text the author has collected a great array of authorities in the notes to the above section.

On the whole case, we respectfully submit that the judgment of the honorable trial court be affirmed.

Respectfully submitted,

P. D. SMITH,

Attorney for Appellees.

Conconully, Washington.

United States
Circuit Court of Appeals
For the Ninth Circuit.

In the Matter of the Contempt of H. LOWNDES
MAURY, Contemnor,

H. LOWNDES MAURY,
Plaintiff in Error,
vs.

BOSTON AND MONTANA CONSOLIDATED COPPER
AND SILVER MINING COMPANY, a Corpora-
tion, and THE UNITED STATES OF AMERICA,
Defendants in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of
the District of Montana.

FILED

DEC 30 1912

United States
Circuit Court of Appeals
For the Ninth Circuit.

In the Matter of the Contempt of H. LOWNDES
MAURY, Contemnor,

H. LOWNDES MAURY,

Plaintiff in Error,

vs.

BOSTON AND MONTANA CONSOLIDATED COPPER
AND SILVER MINING COMPANY, a Corpora-
tion, and THE UNITED STATES OF AMERICA,
Defendants in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of
the District of Montana.

INDEX TO PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

	Page
Assignment of Errors.....	17
Attorneys of Record, Names and Addresses of..	1
Certificate of Clerk U. S. District Court to Record, etc.....	27
Citation.....	24
Judgment.....	12
Names and Addresses of Attorneys of Record..	1
Order Allowing Writ of Error, etc.	19
Petition for a Writ of Error.....	15
Return to Writ of Error.....	23
Statement of Court and Judgment of Contempt.	2
Writ of Error.....	21

Names and Addresses of Attorneys of Record.

H. LOWNDES MAURY, Butte, Montana, S. T.
HOGEVALL and L. P. FORESTELL, 512-514
Call Building, San Francisco, California,
Attorneys for Plaintiff in Error.

*In the District Court of the United States, District
of Montana.*

No. 401.

MYRTLE NORTHAM and HEDLEY NORTHAM,
by MYRTLE NORTHAM, His Next Friend,
Plaintiffs,

vs.

BOSTON AND MONTANA CONSOLIDATED
COPPER AND SILVER MINING COM-
PANY, a Corporation,
Defendant.

In re Contempt, H. L. MAURY, Contemnor.

BE IT REMEMBERED that on the seventeenth
day of October, 1912, a statement of the Court and
judgment of contempt was filed and entered herein
as follows, to wit:

[Statement of Court and Judgment of Contempt.]

*In the District Court of the United States, Ninth
Circuit, District of Montana.*

No. 401—AT LAW.

MYRTLE NORTHAM and HEADLEY NORTHAM,
by MYRTLE NORTHAM, His Next
FRIEND,

Plaintiffs,

vs.

BOSTON AND MONTANA CONSOLIDATED
COPPER AND SILVER MINING COM-
PANY, a Corporation,

Defendant.

In re Contempt, H. L. MAURY, Contemnor.

THE COURT'S STATEMENT.

This cause came on to be heard the 10th day of October, 1912. It was and is an action for \$35,000.00 damages, alleged to have arisen from injuries to the husband of one plaintiff and the father of the minor plaintiff, from neglect of defendant, and causing death.

With twelve men in the jury-box, counsel for plaintiff, Mr. H. L. Maury, proceeded to state, preliminary to examination on *voir dire*, the nature of the case to the jury, therein using the language hereinafter set out in the Court's recital of the facts made later in relation hereto; that in his opening statement to the jury said counsel used the language [1*] hereinafter set out in said recital accompanied by the circumstances therein disclosed; that on the

*Page-number appearing at foot of page of original certified Record.

11th day of October, 1912, and on conclusion of all the evidence and argument in the case, the Court instructed the jury and therein admonished them not to be in any wise influenced by the said language of said counsel; that immediately after the jury retired the Court admonished said counsel to remain, and thereupon the Court proceeded as follows, and the following proceedings were had, the Court's comments in larger part, that is, to the bottom of page 4 thereof, then being in writing and not filed herein, viz.: [2]

The COURT.—In order to perform the duty of the Court, in reference to the remarks referred to in the instructions, it is necessary to recite and make a record of the facts. When the jury was being empaneled and in his opening statement, counsel for plaintiff, Mr. H. L. Maury, made certain statements that the Court deems so clearly misconduct, and so grave in character, that they cannot be overlooked. Before questioning on *voir dire* the aforesaid counsel said to the jury: "I cannot win this case in Silver Bow County, so my questioning will be very particular." And in the course of his opening statement said counsel spoke as follows:

"Mr. MAURY.—And if we show you these facts, and if it is shown that Northam could not reasonably be expected in coming under that rock to know of its condition on that day on which he was killed, then are we entitled to a verdict at your hands, in favor of these plaintiffs and against the defendant. Lawyers usually close their statements of this kind that they expect a verdict at the hands of the jury. I do not

expect more than a hung jury here against the defendant. If this case were in Dillon, Helena, Billings, Missoula, I would—

“The COURT.—Mr. Maury, I think—

“Mr. STIVERS.—I except to the statement of the counsel—

“The COURT.—I think you are, putting it mildly, most disrespectful to the jury. These jurors are officers of the court and the court will not permit you to continue in any [3] such line of statement as that. Your duty, in the opening statement, is to state the facts you expect to prove, and not to go beyond that, so confine yourself to that.

“Mr. MAURY.—I except to the statement of the Judge.

“The COURT.—Proceed.

“Mr. MAURY.—This evidence will warrant and demonstrate that the plaintiffs are entitled to a verdict at your hands in an amount of twenty-five or thirty thousand dollars. I thank you very much.”

The aforesaid language and the attitude, demeanor and tone of counsel was capable of and intended to bear but one construction, namely, that in the opinion of counsel, there were members of the jury who were of so poor a spirit, so lacking in manhood, that in spite of their oath to render a fair and impartial verdict, and in spite of their sworn freedom from bias and prejudice, they would either, from cowardice, fear of a powerful defendant, or desire to favor it, refuse to join in a verdict against the defendant, though such verdict was demanded by the facts and the law. And the design was apparent, and clearly to coerce

and intimidate the jury into finding a verdict for the plaintiffs whether warranted or not. Counsel evidently reasoned that if the jury were given to understand in advance that he held such a contemptuous opinion of them, they would be bound at any hazard to find for the plaintiff in order to demonstrate that counsel's opinion was erroneous, and in order to vindicate [4] themselves in the eyes of those who heard counsel's remarks, or who might hear of them. This was doubtless thought by counsel to be shrewd policy, and to make for his reputation for daring, if not courage.

It was more foolhardy than daring, and if courage, it would seem it was not the courage that springs from a brave and honest spirit, but that which is the offspring of a timid, overbearing and insolent one. For counsel impeached the honor and moral courage of these jurymen in open court, and while counsel was protected from their just resentment in word, if not in deed, by the sanctity of the court which counsel outraged, and by the jury's own respect for the dignity of the Court, counsel insulted them when they were helpless, as clearly as though he had used express language to make a direct charge, instead of indirectly making it by way of ugly insinuation. Counsel evidently thought that by indirection he could offend, and because of indirection, escape the consequences of that offending. That would seem to be the reverse of courage, and no zeal of counsel in a client's behalf can excuse, and little palliate.

Juries are part of the court, and entitled to protection by the Court. They must and will receive pro-

tection. If juries can be thus insulted, brow-beaten, intimidated and coerced by counsel, who are officers of the court, and with impunity, the office of juror would be feared, hated, despised, and jury service become contemptible; courts would [5] become a place for brawling, its administration of justice obstructed, and justice itself defeated.

The remarks of counsel were especially reprehensible in that he is a member of the legal profession and an officer of this court, sworn to uphold its dignity, to protect its honor, to aid it to do justice. He abused his office and violated his duty. Such conduct degrades the legal profession and incites others to deride the courts, to the infinite moral harm and loss of the entire people. And because language such as counsel's is offensive, calculated to intimidate and coerce jurors, and to obstruct and defeat justice, its indulgence in open court is misconduct in his office of attorney and counsellor of this court, and is contempt of court in the face of the court. It deserves and must receive condemnation and such action by the Court that the offense may be expiated, and counsel, and any others that might be tempted to follow his unfortunate example therein, deterred therefrom.

Mr. Maury, have you anything to say why the judgment of the Court, accordingly, should not be pronounced against you? [6]

Mr. MAURY.—Yes, your Honor, I have. The statement of fact is erroneous in one particular. I am speaking of the abstract exact facts of conduct. The first statement, before going into *voir dire*, was not in view of the fact that “I cannot win this case in

Silver Bow County, and therefore my questioning shall be somewhat elaborate," but it was in view of the fact that I believe I cannot win this case in Silver Bow County—"my questioning shall be elaborate." Thus much for that. That was the truth. I believe in standing before any and every court with a mind open, so that people may see what is therein, and I still believe that it is unfair to litigants against the Anaconda Copper Mining Company, or any of its associate concerns, to force them to trial, in this county. I have never changed my opinion as originally set forth in an affidavit on file in this court,—please turn the lights on, I have somewhat to say,—on file in this court. Nor will I change until results might change my mind.

The Federal Court in the State of North Carolina has refused to transfer a cause for trial against a popular congressman to the home of—the district wherein was the home of their congressman; and that decision was the reason why this case was originally commenced in Helena. This court transferred this case here to the home, not of a popular congressman, but to the home of a corporation which absolutely controls the destinies of ten thousand men in this community; and I felt, and I still feel, that there was an injustice done [7] to Myrtle Northam, and to Hedley Northam in that regard.

That is my feeling to-day as it has been ever since. I felt then that the Strangers' Court had passed from the Strangers' Court into a court where a stranger could not get exact justice,—equal justice, untrammelled justice. I felt that this court then was not up

to the standard set by the North Carolina Federal Court. I feel it yet. There is no use in concealing my feelings to the presiding officers of this court—to courts in general. No man yields higher respects than I do, and it is hearty; it is not that concealed, groveling, bowing boot-licking respect that some men who fawn around courts and judges pay; it is a respect which is acknowledged on all occasions, and without fear and without favor; but it is not that spirit which refuses to criticise, and then, when this District for jury service was fixed by the court, and a tremendous population in the control of this defendant, was placed in, with a very meager population not subject to this area of low barometric pressure in which we live, I felt that again this Court had not done what it knew or thought was unjust, but that an error had been committed,—a permanent error had been committed, which would work injustice in all such cases as this. And feeling that, I went into the trial of this case with a clouded spirit, a spirit that however we might strive, notwithstanding the fact that a judge of this court had previously held against these unfortunate plaintiffs, and that through great exertion and the expense of hundreds of dollars, they had taken an [8] appeal to a higher court and reversed that erroneous decision, which I think was due to that judge's coming in to this area of low barometric pressure.

I don't think he would have decided that case that way in Helena. I believe in mental influences that afflict men, that have no known cause, and even though that appeal had been taken at such terrific

delay and tremendous expense, I felt that we again faced a trial that would not be fair though this was the Strangers' Court. And to a man of historic study, a studious life, who looks back upon the period when this nation was young, and it was, as I believe conceived in liberty and justice, and knowing in my heart that the concept of them did not work out as they intended, that this court did not, in my opinion as a lawyer—others may differ from me—realize the ideals of the founders of this Government. It threw a pall upon my soul, for my soul does go into the interests of my clients. Misfortunes for myself I can stand, and have stood. The misfortunes of others go right to my heart, and sear and burn, and that does make me when I realize that their righteous interests are in desperate straits, take desperate measures with the ultimate object of gaining justice. That was the ultimate end here; and if this Court is above criticism, if any man in this nation is above criticism, I have greatly offended by this talk. If not—if as a citizen of this nation whose ancestors have sprinkled every battlefield with their blood,—who hold my lands in [9] Virginia under the Crown Grant of William and Mary, yet, if this nation has come to the point where any man or institution in it is above criticism, your Honor, then I am an offender against its customs and its laws. As to myself I care little. I don't even care for something that your Honor attributes to me, that I did not know I had,—a reputation for courage, or bravado, I believe your Honor termed it, or something like that. I never knew I had it. I

never sought it; I don't care for it; it is nothing to me. I go along—it is hard for me to practice law in a community where the situation is as I deem it to exist here, and as a majority of the lawyers at this bar deem it to exist. I am not the only one, though I may be more open and free in expressing my candid beliefs. You see, I have generations of freedom behind me. Hundreds of years we have been freemen in my native State, and we resent oppression, and I feel it here in this community, and it is not my nature to bow before any man and say he is better than I am. It is my nature to say he is my equal, but not my superior.

I have spoken at some length, your Honor. I did not expect to when I started. This matter was entirely unexpected to me, for the reason that no contempt was meant. If your Honor gained that impression, then it proceeded from something foreign to me, because, as I have said, I seek this court,—I file my cases here of choice and against this very defendant, and prefer this court to any other court, and my preference has grown greater in the last six or eight months because I [10] expect and receive ampler justice here than I received before the present incumbent took charge of this court. I am willing to abide by your Honor's decision in this matter. There is but one thing that I request,—that your Honor take this matter under advisement: Your Honor suffers somewhat like myself,—from being driven by haste in reaching rapid conclusions. We both have the same failing.

I have concluded, your Honor.

The COURT.—The Court will say that much, perhaps all, that counsel has said, no one will have any quarrel with. The difficulty is as set out in the Court's preceding statement, that you forgot that the time and place was not the time and place for the sentiments of which you delivered yourself to the jury. If, as you say, you made a motion in this case, or rather, you brought the case in Helena, and it was transferred here, and if, as you say, conditions are all that you claim they are, that does not touch the gist of your offending here. The Court is not disposed to be harsh with you. The Court has, however, considered this carefully and seriously from the time the incident occurred. Considering the standing you have at the bar, and in the community, it is deserving of more note from the Court than it would be if you were a tyro at the bar. You are counsel of years of learning and experience, and appreciate that there was an offense to the jury, and to the Court, and an offense to the opposing counsel, and an offense to yourself; and while the [11] Court believes that it might fittingly suspend you for an indefinite period from practice here, it will not do so, but it is the order of the Court that the aforesaid counsel, Mr. H. L. Maury, be fined in the sum of five hundred dollars, and be remanded to the custody of the marshal until such fine is paid, or he is otherwise discharged according to law. If a review hereof is desired in the Appellate Court, on motion, a reasonable stay will be granted for that purpose.

Mr. MAURY.—A review will be sought.

The COURT.—What time would you like to have, Mr. Maury?

Mr. MAURY.—I would like sixty days.

The COURT.—Very well.

Mr. MAURY.—And this sentence, your Honor, but confirms—

The COURT.—Mr. Maury, be very careful now. You have made your statement; it will be wise for you to not put yourself in a worse position. You have made your statement, and the Court will not hear further from you.

Thereupon, said counsel, Mr. H. L. Maury, timely took and was granted an exception, and ten days asked and granted for a bill of exceptions.

And thereupon the following entry and record thereof was made in the records of the Court, viz.:
[12]

[Title of Court and Cause.]

[Judgment.]

In the Matter of Contempt of H. LOWNDES
MAURY.

In Open Court—No. 401.

Whereas, on the 10th day of October, 1912, in open court, sitting in the county of Silver Bow, and in the presence of the Judge thereof, Honorable Geo. M. Bourquin, District Judge, presiding, during the session of said court, and while said court was engaged in its regular business, hearing and determining a certain cause pending before it, in which Myrtle Jones et al. were plaintiffs and the Boston & Montana Consolidated Copper & Silver Mining Company was defendant, one H. Lowndes Maury,

being an attorney at law and a member of the bar of this court, employed on the side of the plaintiffs in said cause, hath been and is guilty of a contempt of this Court, in using language contemptuous and disrespectful to the Court and jury engaged in the trial of said cause, that is to say, in using the following language in his examination of said jurors on *voir dire* and in his opening statement to the jury, to wit:

“MAURY (on *voir dire*).—I cannot win this case in Silver Bow County, so my questions will be very particular.”

MAURY (in his opening statement).—“ And if we show you these facts, and if it is shown that Northam could not reasonably be expected in coming in under that rock to know of its condition on that day on which he was killed, then are [13] we entitled to a verdict at your hands in favor of these plaintiffs and against the defendant. Lawyers usually close their statements of this kind that they expect a verdict at the hands of the jury. I do not expect more than a hung jury here against the defendant. If this case was in Dillon, Helena, Billings, Missoula, I would—

The COURT.—Mr. Maury, I think—

Mr. STIVERS.—I except to the statement of the counsel,—

The COURT.—I think you are, putting it mildly, most disrespectful to the jury. These jurors are officers of the court and the Court will not permit you to continue in any such line of statement as that. Your duty, in the opening statement, is to

state the facts you expect to prove, and not to go beyond that; so confine yourself to that.

Mr. MAURY.—I except to the statement of the Judge.

The COURT.—Proceed.

Mr. MAURY.—This evidence will warrant and demonstrate that the plaintiffs are entitled to a verdict at your hands in an amount of twenty-five or thirty thousand dollars. I thank you very much."

Which language was accompanied by an attitude, demeanor and tone on the part of said H. Lowndes Maury the whole of which was thereafter, as herein set out, found by the Court to be misconduct in office as an attorney and counsellor of this court of and by said H. Lowndes Maury, and found by said Court to constitute and be contempt of the Court, committed [14] in the face thereof.

And whereas, the said H. Lowndes Maury was thereafter, on this 11th day of October, 1912, in open court, and immediately after the submission of said cause to the jury, required by the Court to answer for the said contempt.

And thereupon the Court stated the facts constituting said misconduct and contempt, for a record thereof to be duly filed, and adjudged the same to be misconduct and contempt.

And thereupon the Court asked said H. Lowndes Maury if he had aught to say why judgment accordingly should not be pronounced, and the said H. Lowndes Maury addressed the Court. And the Court holding no reason had been shown, proceeded

to judgment and sentence as follows, to wit:

Now, therefore, it is considered, ordered and adjudged by the Court that the said H. Lowndes Maury, by reason of said acts, was and is, guilty of a contempt of this Court, and that for such, his contempt aforesaid, he, the said H. Lowndes Maury, do pay a fine of Five Hundred Dollars (\$500.00), and be remanded into the custody of the United States Marshal for the District of Montana until said fine is paid or he is otherwise discharged according to law.

And thereupon, on motion duly made, a stay of execution was granted herein for the period of sixty days.

And the foregoing are all the proceedings herein.

Dated October 17, 1912.

GEORGE M. BOURQUIN,

Judge.

(Filed Oct. 17, 1912. Geo. W. Sproule, Clerk. By Harry Drumm, Deputy).

And thereafter to wit, on November 21st, 1912, a petition for writ of error was filed herein, being as follows, to wit: [15]

In the District Court of the United States, in and for the District of Montana.

No. 401—AT LAW.

MYRTLE JONES and HEDLEY NORTHAM, by
MYRTLE JONES, His Guardian ad Litem,
Plaintiffs,

vs.

BOSTON AND MONTANA CONSOLIDATED
COPPER AND SILVER MINING COM-
PANY, a Corporation.

Defendant.

In re Contempt, H. L. MAURY, Contemnor.

Petition for a Writ of Error.

To the Honorable the Judges of said Court:

Now comes H. Lowndes Maury, and says:

That on the 11th day of October, 1912, at the September term, 1912, of the District Court of the United States, in and for the District of Montana, a judgment final in its nature as to the said District Court was rendered and entered in favor of the United States of America in the above-entitled cause and against said Maury, wherein it was adjudged that said Maury be fined in the sum of five hundred (\$500.00) dollars, and be remanded to the custody of the marshal until such fine is paid, or he is otherwise discharged according to law; and in which said judgment and the record of proceedings had prior thereto in said cause certain manifest errors have intervened to the great prejudice of said Maury, which errors are specified in detail in the assignment of errors which has [16] been filed in the said District Court:

Wherefore, the said H. Lowndes Maury, feeling himself aggrieved by the said judgment of the Court below rendered thereon and entered herein, comes now H. Lowndes Maury and petitions said Court for an order allowing said H. Lowndes Maury to prosecute a writ of error to the Honorable the United

States Circuit Court of Appeals for the Ninth Circuit under and according to the laws of the United States in that behalf made and provided for the correction of the errors so complained of, and also that an order be made fixing the amount of bail which the said Maury shall give and furnish in the said District Court upon said writ of error, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to said Circuit Court of Appeals, and the said H. Lowndes Maury herewith presents his assignment of errors in accordance with the rules of the United States Circuit Court of Appeals and the course and practice of this Honorable Court.

And your petitioner will ever pray.

H. LOWNDES MAURY,

Attorney for Himself.

(Filed Nov. 21, 1912. Geo. W. Sproule, Clerk.)

And thereafter, to wit, on November 21st, 1912, assignment of errors was filed herein, which is entered of record as follows, to wit: [17]

In the District Court of the United States in and for the District of Montana.

No. 401—AT LAW.

MYRTLE JONES and HEDLEY NORTHAM, by
MYRTLE JONES, His Guardian ad Litem,
Plaintiffs,

vs.

BOSTON AND MONTANA CONSOLIDATED

COPPER AND SILVER MINING COMPANY, a Corporation,

Defendant.

In re Contempt, H. L. MAURY, Contemnor.

Assignment of Errors.

H. L. Maury, in this action, in connection with his petition for a writ of error, makes the following assignment of errors, which he avers occurred in this matter, and in the proceedings leading up to the final judgment, to wit:

1.

The Court erred in rendering its judgment in the proceedings herein, a day and a night having elapsed since the speaking of the words claimed to be contemptuous and the rendering of judgment by the Court.

2.

The Court erred in rendering judgment herein. In this the Court was without jurisdiction to summarily punish for contempt.

3.

The Court had no jurisdiction to punish for contempt [18] herein without filing written charges, or giving notice, or without a citation.

4.

The evidence is insufficient to sustain the judgment of the Court.

5.

The action of the Court herein was erroneous. The words spoken were not contemptuous under any reasonable construction.

6.

The words spoken were true, and therefore not contemptuous.

7.

The Court erred herein in not giving H. L. Maury an opportunity to defend himself by way of preparing a defense or offering evidence.

8.

The judgment of the Court and punishment assessed by the Court is excessive, unusual and cruel.

WHEREFORE, and for divers other reasons appearing in said record and proceedings, said H. Lowndes Maury, plaintiff in error, prays that said judgment be reversed and that he be discharged, and that the proceedings be dismissed.

H. LOWNDES MAURY,

Attorney for Himself.

(Filed Nov. 21, 1912. George W. Sproule, Clerk.)

And thereafter, to wit, on November 21st, 1912, an order allowing writ of error was filed and entered herein, being as follows, to wit: [19]

In the District Court of the United States in and for the District of Montana.

No. 401—AT LAW.

MYRTLE JONES and HEDLEY NORTHAM,
by MYRTLE JONES, His Guardian ad
Litem,

Plaintiffs,

vs.

BOSTON AND MONTANA CONSOLIDATED

COPPER AND SILVER MINING COM-
PANY, a Corporation,

Defendant.

In re Contempt, H. L. MAURY, Contemnor.

Order Allowing Writ of Error, etc.

This 21st day of November, 1912, came the above-named H. Lowndes Maury, and filed herein and presented to the Court his petition praying for the allowance of a writ of error intended to be urged by him, praying, also, that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit; and that such other and further proceedings may be had as may be proper in the premises; and that pending the final decision of the said Circuit Court of Appeals, H. Lowndes Maury be released on his own recognizance.

On consideration where, the Court does allow the writ of error, and that the said Maury be let at his liberty to bail until the final determination of the said error proceedings by the said Circuit Court of Appeals.

GEO. M. BOURQUIN,
Judge.

(Filed and entered Nov. 21, 1912, Geo. W. Sproule,
Clerk.)

And thereafter, to wit, on November 21st, 1912, a writ of error was duly issued herein, and thereafter, on December 2d, 1912, filed herein, being as follows, to wit: [20]

*In the Circuit Court of Appeals of the United States,
Ninth Circuit.*

No. 401—AT LAW.

MYRTLE JONES and HEDLEY NORTHAM, by
MYRTLE JONES, His Guardian ad Litem,
Plaintiffs,

vs.

BOSTON AND MONTANA CONSOLIDATED
COPPER AND SILVER MINING COM-
PANY, a Corporation,
Defendant.

In re Contempt, H. L. MAURY, Contemnor.

Writ of Error.

United States of America—ss:

The President of the United States to the Honorable
Judge of the District Court of the United States,
in and for the District of Montana, Greeting:

Because in the record and proceedings, as also in the rendition of judgment that H. Lowndes Maury be fined in the sum of five hundred (\$500.00) dollars, and remanded to the custody of the Marshal until the said fine be paid, or he be otherwise discharged according to law in a certain action pending before you, wherein Myrtle Jones and Hedley Northam by Myrtle Jones, his guardian *ad litem*, plaintiffs, and the defendant is Boston and Montana Consolidated

Copper and Silver Mining Company, a corporation, a manifest error hath happened to the great damage of H. Lowndes Maury, as by his petition for writ of error appears. We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to H. Lowndes Maury aforesaid in this behalf do [21] command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same in the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, within thirty days from the date hereof; and that the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals, for the Ninth Circuit, may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

WITNESS the Honorable GEO. M. BOURQUIN, Judge of the United States District Court, District of Montana, the 21st day of November, in the year of our Lord one thousand nine hundred and twelve.

[Seal]

GEO. W. SPROULE,

Clerk of the District Court of the United States for the District of Montana.

Service of the above and foregoing writ of error admitted and copy received this — day of November, 1912.

_____,
_____,

Attorneys for Defendant in Error, Boston and Montana Consolidated Copper and Silver Mining Company.

_____,
_____,

Attorneys for Defendant in Error, United States of America. [22]

Return to Writ of Error.

ANSWER OF COURT TO WRIT OF ERROR.

The answer of the Honorable the District Judge of the United States, in and for the District of Montana, to the foregoing writ:

The record and proceedings whereof mention is made, with all things touching the same, I certify under the seal of said District Court to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed as within I am commanded.

By the Court.

[Seal]

GEO. W. SPROULE,
Clerk. [23]

[Endorsed]: No. 401—At Law. In the Circuit Court of Appeals of the United States, Ninth Circuit. Myrtle Jones and Hedley Northam, by Myrtle

Jones, His Guardian ad Litem, Plaintiffs, vs. Boston and Montana Consolidated Copper and Silver Mining Company, a Corporation, Defendant. Writ of Error. In re Contempt, H. L. Maury, Contemnor. Filed Dec. 2, 1912. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 21st day of November, 1912, a citation was duly issued herein, and thereafter, on December 2d, 1912, filed herein, being as follows, to wit: [24]

*In the District Court of the United States in and for
the District of Montana.*

No. 401—AT LAW.

MYRTLE JONES and HEDLEY NORTHAM, by
MYRTLE JONES, His Guardian ad Litem,
Plaintiffs,

vs.

BOSTON AND MONTANA CONSOLIDATED
COPPER AND SILVER MINING COM-
PANY, a Corporation,
Defendant.

In re Contempt, H. L. MAURY, Contemnor.

Citation.

United States of America,—ss:

The President of the United States to Boston and Montana Consolidated Copper and Silver Mining Company, and to the United States of America, Greeting:

You and each of you are hereby cited and ad-

monished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco in said circuit, within thirty days from the date hereof pursuant to a writ of error filed in the clerk's office of the District Court of the United States of the District of Montana, wherein H. Lowndes Maury is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

In granting this citation, it is the opinion of the Judge that the above-named defendant is no wise interested in the review contemplated, but the form presented by counsel is accepted, to the end that every right his or by him deemed to be his may be protected. [25]

WITNESS the Honorable GEORGE M. BOURQUIN, Judge of the District Court of the United States, this 21st day of November, in the year of our Lord One Thousand Nine Hundred and Twelve.

GEO. M. BOURQUIN,
Judge.

Service upon us this —— day of November, 1912,
of the foregoing citation is hereby admitted.

_____,
_____,
_____.

Attorneys for Defendant in Error, Boston and Mon-
tana Consolidated Copper and Silver Mining
Company.

_____,
_____,
_____.

Attorneys for Defendant in Error, United States of
America. [26]

[Endorsed]: No. 401—At Law. In the District
Court of the United States, in and for the District
of Montana. Myrtle Jones and Hedley Northam, by
Myrtle Jones, His Guardian ad Litem, Plaintiffs, vs.
Boston and Montana Consolidated Copper and Silver
Mining Company, a Corporation, Defendant. In re
Contempt, H. L. Maury, Contemnor. Citation.
Filed Dec. 2, 1912. Geo. W. Sproule, Clerk. [27]

*In the District Court of the United States in and for
the District of Montana.*

United States of America,
District of Montana,—ss.

**[Certificate of Clerk U. S. District Court to Record,
etc.]**

I, George W. Sproule, Clerk of the United States District Court, in and for the District of Montana, do hereby certify and return to the Honorable the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 28 pages, numbered consecutively from one to 28, inclusive, is a true and correct transcript of the pleadings, processes, records, orders, judgment and all other proceedings had in said cause, and of the whole thereof, as appears from the original records and files of said court in my custody and control; and I do further certify and return that I have annexed to said transcript and included within said paging, original citation and writ of error; and I further certify that the costs of the transcript of the record is the sum of \$10.35 (Ten 35/100 Dollars), and that the same have been paid.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said court at Butte, Montana, this 5th day of December, 1912.

[Seal]

GEO. W. SPROULE,
Clerk. [28]

[Endorsed]: No. 2205. United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of the Contempt of H. Lowndes Maury, Contemnor. H. Lowndes Maury, Plaintiff in Error, vs. Boston and Montana Consolidated Copper and Silver Mining Company, a Corporation, and The United States of America, Defendants in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Montana.

Filed December 9, 1912.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of the Contempt of
H. LOWNDES MAURY,

Contemnor.

H. LOWNDES MAURY,

Plaintiff in Error,

vs.

BOSTON AND MONTANA CONSOLIDATED COPPER AND SILVER MINING COMPANY, a Corporation, and THE UNITED STATES OF AMERICA,

Defendants in Error.

BRIEF OF PLAINTIFF IN ERROR.

Upon writ of Error to the United States District Court of the District of Montana, Hon. George M. Bourquin, presiding.

STATEMENT OF THE CASE.

On the 10th day of October, 1912, there was called for trial in the district court, and the trial was commenced therein, a cause at law, Hedley, Northam and another against Boston & Montana Consolidated Copper and Silver Mining Company, a corporation, an action for damages for death of John Northam, the father of one of the plaintiffs, the husband of the other plaintiff.

The alleged contemnor, H. Lowndes Maury, a member of the bar of the nisi prius court and of the appellate court, was of counsel for the plaintiffs. Before going into the *voir dire*, the said Maury stated to twelve men of the panel whose names had been first drawn (according to the court's record, which must control of course in the court of appeals), I cannot win this case in Silver Bow County so my questioning will be very particular." Note well that while the record of the court is controlling upon the upper court, a proposition which we cannot deny, yet wherever this record does not state the fact we shall still set forth the truth. Counsel actually said, "In view of the fact that I believe I cannot win this case in Silver Bow County my questioning shall be elaborate." 7 R. 3.

The cause was being tried in the city of Butte in the county of Silver Bow. The trial proceeded and a jury was empaneled. The alleged contemnor then proceeded to make an opening statement of what he

expected to prove on behalf of the plaintiffs, and then used the following language:

"And if we show you these facts, and if it is shown that Northam could not reasonably be expected in coming under that rock to know of its condition on that day on which he was killed, then are we entitled to a verdict at your hands in favor of these plaintiffs and against the defendant. Lawyers usually close their statements of this kind that they expect a verdict at the hands of the jury. I do not expect more than a hung jury here against the defendant. If this case were in Dillon, Helena, Billings, Missoula, I would—" 3 R. 20 to 4 R. 3.

The court then interrupted: "Mr. Maury, I think"—Opposing counsel interrupted, "Mr. Stivers: I except to the statement of counsel." The court continued: "The court: I think you are, putting it mildly, most disrespectful to the jury. These jurors are officers of the court and the court will not permit you to continue in any such line of statement as that. Your duty in the opening statement is to state the facts you expect to prove and not to go beyond that, so confine yourself to that." Mr. Maury: "I except to the statement of the judge." The court: "Proceed." Mr. Maury: This evidence will warrant and demonstrate that the plaintiffs are entitled to a verdict at your hands in an amount of twenty-five or thirty thousand dollars. I thank you very much." 4 R.

The trial proceeded without further mention by the court or counsel of the incident until the charge of the court to the jury at its conclusion on the next day. Mention was made of the incident in the charge by the presiding judge. After the charge, when the jury had retired, as Mr. Maury was leaving the court room, the court directed him to remain, and thereupon, without further notice or citation or time being allowed to present a defense, the court spoke as follows:

“THE COURT: —In order to perform the duty of the Court, in reference to the remarks referred to in the instructions, it is necessary to recite and make a record of the facts. When the jury was being empaneled and in his opening statement, counsel for plaintiff, Mr. H. L. Maury, made certain statements that the Court deems so clearly misconduct, and so grave in character, that they cannot be overlooked. Before questioning on *voir dire* the aforesaid counsel said to the jury: ‘I cannot win this case in Silver Bow County, so my questioning will be very particular.’ And in the course of his opening statement said counsel spoke as follows:

‘Mr. Maury:—And if we show you these facts, and if it is shown that Northam could not reasonably be expected in coming under that rock to know of its condition on that day on which he was killed, then are we entitled to a verdict at your hands, in favor of these plaintiffs and against the

defendant. Lawyers usually close their statements of this kind that they expect a verdict at the hands of the jury. I do not expect more than a hung jury here against the defendant. If this case were in Dillon, Helena, Billings, Missoula, I would—

‘The Court.—Mr. Maury, I think —

‘Mr. Stivers.—I except to the statement of the counsel—

‘The Court.—I think you are, putting it mildly, most disrespectful to the jury. These jurors are officers of the court and the court will not permit you to continue in any such line of statement as that. Your duty, in the opening statement, is to state the facts you expect to prove, and not to go beyond that, so confine yourself to that.

‘Mr. Maury.—I except to the statement of the Judge.

‘The Court.—Proceed.

‘Mr. Maury.—This evidence will warrant and demonstrate that the plaintiffs are entitled to a verdict at your hands in an amount of twenty-five or thirty thousand dollars. I thank you very much.’

The aforesaid language and the attitude, demeanor and tone of counsel was capable of and intended to bear but one construction, namely, that in the opinion of counsel, there were members of the jury who were of so poor a spirit, so lacking in manhood, that in spite of their oath to render

a fair and impartial verdict, and in spite of their sworn freedom from bias and prejudice, they would either, from cowardice, fear of a powerful defendant, or desire to favor it, refuse to join in a verdict against the defendant, though such verdict was demanded by the facts and the law. And the design was apparent, and clearly to coerce and intimidate the jury into finding a verdict for the plaintiffs whether warranted or not. Counsel evidently reasoned that if the jury were given to understand in advance that he held such a contemptuous opinion of them, they would be bound at any hazard, to find for the plaintiff in order to demonstrate that counsel's opinion was erroneous, and in order to vindicate themselves in the eyes of those who heard counsel's remarks, or who might hear of them. This was doubtless thought by counsel to be shrewd policy, and to make for his reputation for daring, if not courage.

It was more foolhardy than daring, and if courage, it would seem it was not the courage that springs from a brave and honest spirit, but that which is the offspring of a timid, overbearing and insolent one. For counsel impeached the honor and moral courage of these jurymen in open court, and while counsel was protected from their just resentment in word, if not in deed, by the sanctity of the court which counsel outraged, and by the jury's own respect for the dignity of

the Court, counsel insulted them when they were helpless, as clearly as though he had used express language to make a direct charge, instead of indirectly making it by way of ugly insinuation. Counsel evidently thought that by indirection he could offend, and because of indirection, escape the consequences of that offending. That would seem to be the reverse of courage, and no zeal of counsel in a client's behalf can excuse, and little palliate.

Juries are part of the court, and entitled to protection by the Court. They must and will receive protection. If juries can be thus insulted, brow-beaten, intimidated and coerced by counsel, who are officers of the court, and with impunity, the office of juror would be feared, hated, despised, and jury service became contemptible; courts would become a place for brawling, its administration of justice obstructed, and justice itself defeated.

The remarks of counsel were especially reprehensible in that he is a member of the legal profession and an officer of this court, sworn to uphold its dignity, to protect its honor, to aid it and do justice. He abused his office and violated his duty. Such conduct degrades the legal profession and incites others to deride the courts, to the infinite moral harm and loss of the entire people. And because language such as counsel's is offensive, calculated to intimidate and coerce jurors,

and to obstruct and defeat justice, its indulgence in open court is misconduct in his office of attorney and counsellor of this court, and is contempt of court in the face of the court. It deserves and must receive condemnation and such action by the Court that the offense may be expiated, and counsel, and any others that might be tempted to follow his unfortunate example therein, deterred therefrom."

And thereupon, to the oral charges of the court, Mr. Maury spoke as follows, with the exception of one typographical error, R. page 9, line 22, the record appears "whose ancestors have sprinkled every battle field with their blood." The words spoken were "whose ancestors have sprinkled her early battlefields with their blood":

"Mr. Maury: Yes, your Honor I have. The statement of fact is erroneous in one particular. I am speaking of the abstract exact facts of conduct. The first statement, before going into *voir dire*, was, not in view of the fact that 'I cannot win this case in Silver Bow County, and therefore my questioning shall be somewhat elaborate,' but it was in view of the fact that 'I believe I cannot win this case in Silver Bow County—my questioning shall be elaborate.' Thus much for that. That was the truth. I believe in standing before any and every court with a mind open, so that people may see what is therein, and I still

believe that it is unfair to litigants against the Anaconda Copper Mining Company, or any of its associate concerns, to force them to trial, in this county. I have never changed my opinion as originally set forth in an affidavit on file in this court,—please turn the lights on, I have somewhat to say,—on file in this court. Nor will I change until results might change my mind.

The Federal Court in the State of North Carolina has refused to transfer a cause for trial against a popular congressman to the home of—the district where was the home of this congressman; and that decision was the reason why this case was originally commenced in Helena. This court transferred this case here to the home, not of a popular congressman, but to the home of a corporation which absolutely controls the destinies of ten thousand men in this community; and I felt, and I still feel, that there was an injustice done to Myrtle Northam, and to Hedley Northam in that regard.

That is my feeling today as it has been ever since. I felt then that the Strangers' Court had passed from the Strangers' Court into a court where a stranger could not get exact justice,—equal justice, untrammelled justice. I felt that this court then was not up to the standard set by the North Carolina Federal Court. I feel it yet. There is no use in concealing my feelings to the presiding officers of this court—to courts in gen-

eral. No man yields higher respect than I do, and it is hearty; it is not that concealed, groveling, bowing, boot-licking respect that some men who fawn around courts and judges pay; it is a respect which is acknowledged on all occasions, and without fear and without favor; but it is not that spirit which refuses to criticize. And then, when this District for jury service was fixed by the court, and a tremendous population in the control of this defendant, was placed in, with a very meager population not subject to this area of low barometric pressure in which we live, I felt that again this Court had not done what it knew or thought was unjust, but that an error had been committed,—a permanent error had been committed, which would work injustice in all such cases as this. And feeling that, I went into the trial of this case with a clouded spirit, a spirit that however we might strive, notwithstanding the fact that a judge of this court had previously held against these unfortunate plaintiffs, and that through great exertion and the expense of hundreds of dollars, they had taken an appeal to a higher court and reversed that erroneous decision, which I think was due to that judge's coming in to this area of low barometric pressure, they would not get justice.

I don't think he would have decided that case that way in Helena. I believe in mental influences that afflict men, that have no known cause, and

even though that appeal had been taken at such terrific delay and tremendous expense, I felt that we again faced a trial that would not be fair though this was the Strangers' Court. And to a man of historic study, a studious life, who looks back upon the period when this nation was young, and it was, as I believe conceived in liberty and justice, and knowing in my heart that the concept of them did not work out as they intended, that this court did not, in my opinion as a lawyer—others may differ from me—realize the ideals of the founders of this Government. It threw a pall upon my soul, for my soul does go into the interests of my clients. Misfortunes for myself I can stand, and have stood. The misfortunes of others go right to my heart, and sear and burn, and that does make me when I realize that their righteous interests are in desperate straits, take desperate measures with the ultimate object of gaining justice. That was the ultimate end here; and if this court is above criticism, if any man in this nation is above criticism, I have greatly offended by this talk. If not—if as a citizen of this nation whose ancestors have sprinkled her early battlefields with their blood,—who hold my lands in Virginia under the Crown Grant of William and Mary, yet, if this nation has come to the point where any man or institution in it is above criticism, your Honor, then I am an offender against its customs and its laws. As to

myself I care little. I don't even care for something that your Honor attributes to me, that I did not know I had,—a reputation for courage, or bravado, I believe your Honor termed it, or something like that. I never knew I had it. I never sought it; I don't care for it; it is nothing to me. I go along—it is hard for me to practice law in a community where the situation is as I deem it to exist here, and as a majority of the lawyers at this bar deem it to exist. I am not the only one, though I may be more open and free in expressing my candid beliefs. You see, I have generations of freedom behind me. Hundreds of years we have been freemen in my native state, and we resent oppression, and I feel it here in this community, and it is not my nature to bow before any man and say he is better than I am. It is my nature to say he is my equal, but not my superior.

I have spoken at some length, your Honor. I did not expect to when I started. This matter was entirely unexpected to me, for the reason that no contempt was meant. If your Honor gained that impression, then it proceeded from something foreign to me, because, as I have said, I seek this court,—I file my cases here of choice and against this very defendant, and prefer this court to any other court, and my preference has grown greater in the last six or eight months because I expect and receive ampler justice here

than I received before the present incumbent took charge of this court. I am willing to abide by your Honor's decision in this matter. There is but one thing that I request,—that your Honor take this matter under advisement; your Honor suffers somewhat like myself,—from being driven by haste in reaching rapid conclusions. We both have the same failing.

I have concluded, your honor."

And at the conclusion, the court spoke as follows:

The Court:—The Court will say that much, perhaps all, that counsel has said, no one will have any quarrel with. The difficulty is at set out in the Court's preceding statement, that you forgot that the time and place was not the time and place for the sentiments of which you delivered yourself to the jury. If, as you say, you made a motion in this case, or rather, you brought the case in Helena, and it was transferred here, and if, as you say, conditions are all that you claim they are, that does not touch the gist of your offending here. The Court is not disposed to be harsh with you. The Court has, however, considered this carefully and seriously from the time the incident occurred. Considering the standing you have at the bar, and in the community, it is deserving of more note from the Court than it would be if you were a tyro at the bar. You are counsel of years of learning and experience,

and appreciate that there was an offense to the jury, and to the Court, and an offense to the opposing counsel, and an offense to yourself; and while the Court believes that it might fittingly suspend you for an indefinite period from practice here, it will not do so, but it is the order of the Court that the aforesaid counsel, Mr. H. L. Maury, be fined in the sum of five hundred dollars, and be remanded to the custody of the marshal until such fine is paid, or he is otherwise discharged according to law. If a review hereof is desired in the Appellate Court, on motion, a reasonable stay will be granted for that purpose."

Thereupon Mr. Maury announced that a review would be sought and Mr. Maury said: "And this sentence, your Honor, but confirms—" 12 R. 5, and the court said: "Mr. Maury, be very careful now. You have made your statement, it will be wise for you to not put yourself in a worse position. You have made your statement and the court will not hear further from you."

And thereafter the court entered judgment to the effect that H. Lowndes Maury do pay a fine of \$500.00, and be remanded unto the custody of the United States Marshal for the district of Montana until such fine is paid, or he is otherwise discharged according to law. Stay of execution was granted herein.

Thereafter said Maury filed an assignment of errors, 18 R. 19 R. Writ of error was allowed by order.

SPECIFICATION OF ERRORS.

1. The court erred in rendering and entering judgment that H. Lowndes Maury be fined in the sum of five hundred dollars, and remanded to custody until such fine be paid.

2. The evidence is insufficient to sustain the judgment.

ARGUMENT AND AUTHORITIES.

There is, and of necessity must be, in every court of record, power to punish summarily for contempt of the tribunal. No one is more ready heartily to acquiesce in that fundamental necessary rule of national existence than the alleged contemnor in this case, but whenever there be contempt in the presence of the court, then it is the universal custom to do one of two things:

(1) Administer punishment forthwith instantly. One reason why this course is permitted to courts is, there are always impartial persons in court, under the English system of holding courts openly to the public; and they are a check and judge between the alleged contemnor and arbitrary action on the part of the court.

Here the attendants and spectators see the entire occurrence and in this instance we claim that had the court *dum opus fervet* proceeded to administer

punishment his respect for the good opinion of the officers, attendants and spectators would have restrained him from any cruel and unusual punishment. We contend that such is one of the reasons why our system, different from the continental system, requires the proceedings of court to be open to the world. The other method is to cite the alleged contemnor to answer and give him time to order his cause (as Job felt the need of even before the Allwise and Alljust Jehovah). Neither method was pursued here.

The law knows no fractions of a day. It would be deemed (though perhaps unfairly) instant action had the court acted on the same day. Here a trial proceeded to its end and as Maury's remarks to turn on the lights show, the evening of the second day had set in before the court proceeded to convict, and this conviction was made before any evidence, notice, citation, arraignment or trial. The proceedings consisted of the familiar post-verdict-of-guilty, request if the accused (convicted) had anything to say why punishment should not be administered.

We ask how long can the judge carry secreted in his breast the determination to punish? If he can carry it overnight he can carry it for years. If he can carry a fine of five hundred dollars, enough to compel imprisonment of a large percentage of the bar of the union, he can carry a fine of five thousand dollars, enough to imprison ninety-eight per cent. of

the bar of the union. He can enslave that class which De Tocqueville, eighty years ago, in words which seem prophetic, distinguished as the chief guardians of the liberties of the United States. Thus would these guardians of freedom be reduced to servile fear.

Furthermore, he can, if these words are contemptuous (such have never before been deemed so by any court in America, and similar slighting words ofjuries have been used by the courts themselves frequently) hold any words contemptuous.

Thus our due process of law is reduced to the will of the judge and there is ushered in a new system of cruel and unusual punishments, not against the rabble, nor outcasts, but against men whose sworn duty it is, according to Sharswood, in his work on legal ethics, to sometimes admonish the judge himself that his course is wrong.

The privileges of the bar in the United States have been compared to the tribunitian power in Rome. As members of the bar, we ask, are we to be put in fear of bondage or the strippings of the savings of years because we do our duty as we see it? We say the strippings of the savings of years. Our profession is not wealthy. The court knows of many high minded and useful men in this profession that a fine of five hundred dollars would cripple or imprison.

The need of payment of this fine is not, however, the most serious aspect of it. Such a fine attracts public attention to the fact that the supposed offender must

have been in grave contempt of the most sacred institution of the national life. Thereby it kills the further usefulness of the lawyer before the public and juries drawn from it. To expect further clientage before the judge administering the fine is preposterous.

A man may have given twenty years of unremitting toil to perfect himself morally, mentally, learnedly, for noble work for the public and lucrative employment for himself and his sons after him, and suddenly, when he is about to live in the habitation he has builded with so much toil, to eat the harvest which he has reared, he is doomed to great financial loss, and what is more, the loss of standing before his community and his friends. He is deprived of something far higher than his property without any due process of law, and indirectly, of his lucrative profession.

We assert that never before in the history of the American union has a fine of such an amount been administered by any court for a refined, quiet, gentlemanly expression of any opinion. This fine is unusual to say the least. Its cruelty springs more from the standing attributed by the court to the alleged contemnor than from its need of payment (if affirmed). It is needless to say that the power of Maury in this community where this fine was administered is almost destroyed.

And now let us see what words provoked such a penalty: "I cannot win this case in Silver Bow

County so my questioning will be very particular." Hundreds of thousands of lawyers have gone into the trial of causes in certain localities with absolute knowledge that their sole chance was a disagreement and a new trial in another community. The courts themselves have for a generation or more on thousands of occasions in the United States, spoken of the inability of certain litigants to get fair trials before juries. The case which comes to mind first is the language of the Supreme Court of the United States in *Butler v. Frazee*, 211 U. S. 465. We quote:

"That these considerations have had an influence is shown by the notorious unwillingness of juries to apply the rule, etc."

Legislatures have recognized the imperfections of juries. We assert that there is not a state in the union that does not permit a judge, by statute or by common law, to set aside a verdict of a jury if he is convinced that the verdict proceeds from passion or prejudice or undue influence of any kind. We aver that the trial courts of the federal judiciary have for time immemorial continually granted new trials by reason of the acknowledged imperfections of the jury system. In these matters it is not improper, as we believe, to call attention to the acts of other high minded and respected members of the bar for the purpose of comparison. In the files of this court, in a petition for rehearing filed by a gentleman and a

scholar, than whom, in our northwest country, there is no lawyer who receives higher respect of his community and the members of the bar, the following words appear:

“Why should the judgment of an experienced and able trial judge, upon uncontradicted testimony, be subordinated to that of twelve ignorant, inexperienced and irresponsible men.”

P. 12, Petition for Rehearing, Williams v. Bunker Hill & Sullivan Mining and Concentrating Co.

This very presiding judge has when a *nisi prius* judge of the state court in the county of Silver Bow, exercised that prerogative often and reduced verdicts in large amounts, reciting that they were the outcome of passion and prejudice, and he has set them aside entirely on the same grounds. He has peremptorily, and in the midst of (not a term because we have a continuous term in this county), but long before he expected to complete the work for a panel, dismissed the panel because it was not answering his judicial ideas. In one instance the jury acquitted a man accused of gambling where the evidence was clear and convincing, and immediately this very presiding judge discharged the panel though there was much business to be attended to. We fail to see why an officer whose duty it is sometimes to charge the judge himself with error, who is permitted under the *federal* laws to

charge the judge himself with bias and prejudice in affidavits, is restricted from, and guilty of flagrant contempt if, he courteously, and in the exercise of what he believes to be his duty, openly tells the subordinate officers of the court, the jury themselves, his own feelings in the matter if those feelings are reasonably justified by the situation, in order to prevent the evil he fears.

We do not say that custom justifies any wrongful act on the part of an advocate, but the fact that the thing has been done before and gone unchallenged by other judges equally mindful of the dignity of their courts is some argument that the offense is not regarded by the judiciary, as a whole, as an offense at all. This same attorney charged with offensive conduct here has stood in the court house of Silver Bow County defending a man of notoriously bad reputation in the community on the charge of murder in the first degree, and put the jurors on their guard by openly saying that he did not believe his client could have a fair trial before them. We say it was legitimate advocacy. The man, who was innocent in that instance, was entitled to a fair trial in that case regardless of his past offenses or reputation for such offenses, and that very free and candid statement went a long ways towards saving the very life of the man whose previous conduct had been bad, but who was rightfully declared innocent of all crime in the case at bar. We cite this as an illustration.

In support of our argument that Maury should have been permitted an opportunity to introduce evidence we believe it is perfectly legitimate to state a supposed case of what might have been proven. We cannot see why it is necessary, in stating a supposed case, to draw upon the imagination in preference to what might have been proven as actual facts in this case. We are going to state what could have been proven in evidence in complete justification of Maury's position and language as if all the facts were imaginary. The fact is that our supposed case corresponds exactly with the truth.

Suppose that the real party in interest here were the Anaconda Copper Mining Company, substituted by reason of a consolidation, for the defendant Boston and Montana Mining Company; suppose that company gave employment in the counties of Silver Bow and Deer Lodge to fifteen thousand men; suppose all other employers of labor combined in the two counties gave employment only to thirty-five hundred men; suppose the jury panel as it stood contained three-fourths from these two counties, one-fourth from other counties in Montana; suppose the only important industries in these two counties were mining and smelting; suppose this company owned great railroad interests, great banking interests, great electric power interests, great mercantile interests in these two counties; suppose that this company with six others, which shall hereafter be mentioned as

being consolidated into this company previous to the date of this trial, had taken great interest in politics of the two counties and of the state; suppose that for ten years preceding this trial an average of forty-five men per year had been killed underground in the mines of this company and the others to be mentioned hereafter; supposing that one hundred and fifty men per year had been grievously injured underground in the mines of this company and its associates for the same period, making in all in the ten years nineteen hundred and fifty deaths or grievous injuries in these mines; and then suppose that Maury stood there conscious of a fact that never, in ten years, had there been against this consolidated company, or against any of its component factors a single, solitary final recovery in a court of law of Montana against any one of them for an injury or death occurring underground (though such cases had been attempted time without number by the ablest men at the bar of Montana); suppose this defendant were so powerful in politics, that openly, at a primary election for delegates to a convention, in one political party forty-seven hundred votes were cast for their representatives, and at the election succeeding, under the Australian ballot system, less than three thousand votes were cast by that entire political party in the county; suppose that there sat upon this jury which Maury was addressing in the opening statement, after all peremptory challenges had been exhausted, a man,

who for many years had been a political leader for this defendant and its associates, a man who had been elected county commissioner of that county of Silver Bow as an ordinary working man without any means, served two terms or more due to the support given him by the defendant for his second term, and came out the owner of a four story building, which was on the day of the trial being occupied by the official newspaper organ of the defendant as his tenant; suppose that man, when more than a dozen indictments had been filed against him for malfeasance in that office, was represented by, and successfully defended (on technical grounds) by one of the attorneys for the defendant in the instant case; suppose there were others upon that jury which are absolutely and as thoroughly within the control of the defendant as this one; and then tell a lawyer to so stultify himself as to expect a unanimous verdict from that jury in favor of a widow and child against that defendant, is to tell a lawyer that he must *lie* in order to preserve the dignity of the court.

But we will go further in our imaginary caes: Suppose the influence of that defendant was so great that even the presiding judge of the court fell such a victim to it as to announce in open court, after having the same testimony that the Circuit Court of Appeals once held was sufficient to take the case to the jury, that the Circuit Courts of Appeals was wrong, and that the case should be non suited. And suppose,

further, to cap the climax of our imaginary case, that Maury's knowledge of this influence was so accurate, as justified by subsequent events, that as part of the *res gestae* of this entire transaction, when the fine was administered one of the attorneys for the defendant (and a good fellow too), stepped over and said to Maury, (a white man, born of free parents), "Wait until the election is over and this will be remitted," as if he were a part of the machinery of the court or something higher, possessing the pardoning power over that court's actions.

The evidence would have shown that this cause was once pending in the state courts; that in order to get away from local influence and to place the stranger's cause before the court established by our fathers for the stranger, on the advice of Maury it was dismissed in the court where local influence was feared, and recommenced in the national court. The evidence would show that the very purpose and reason for doing so was that unanimity of jurors was required in the federal court, and that counsel believed that American citizenship was not so thoroughly debased in the desert of Butte that twelve men could be found to decide against a widow and child where the evidence was as strong as it was in this case.

As to the six companies alluded to as having been previously consolidated with the Anaconda, the names and their strength are even judicially known to some of the members of the Circuit Court of Appeals. They

were the Boston & Montana Consolidated Copper & Silver Mining Company, Butte & Boston Consolidated Mining Company, the Trenton Mining and Developing Company, the Original Consolidated Mining Company, the Washoe Copper Company and the Parrot Silver & Copper Company.

The foregoing facts are fair argument on the question of the right of Maury to put in evidence and to have time to do so

Another fact is relevant and could easily have been shown if time had been allowed: The entire jury were just as Maury considered some of them. They united in a verdict for the defendant and against the plaintiffs after very slight deliberation.

But except for laying a local coloring and setting to the answer which Maury gave the court off-hand, after the wear of an exciting trial, they are hardly necessary because the judge himself, when Maury finished, said: "The court will say that much, perhaps all that counsel has said no one will have any quarrel with." 11 R. 1. "The difficulty is, as set out in the court's preceding statement, that the time and place was not the time and place for the sentiments of which you delivered yourself to the jury."

Here is an admission by the court while the matter burned, of the truth of my statements, and my statements off-hand as they were, without time for preparation, spontaneous, embrace in substance all of the supposed case. And the point at issue here is de-

fined sharply, whether the legal profession in its advocacy of just causes, must act with servile duplicity in the presence of the court and its officers, must lick the hand that strikes them, or rather their clients, whose rights are often dearer to the heart of the advocate than his own, or whether it can, whenever relevant or germane to the case, tell the unvarnished truth.

The foregoing has been written by the contemnor alleged. In writing it, he finds fault with no man on earth. He realizes that the actions of men are due and traceable to two causes alone,—environment and heredity. The said Maury does not claim that if his own parents and grandparents had been servants to man or to commercialism, he would do any otherwise in this community than the vast majority of the other residents herein.

The said Maury has a few words more, and then the remainder of this brief will be written by counsel more able to handle its legal aspect than Maury, and in whose ability, recognized of years of association at the bar of Butte (though they have now moved to larger fields of endeavor in San Francisco) the said Maury has abiding faith.

Another comparison is this: During sixteen years of practice at the bar, during three years of study and association in law offices before being admitted, I, Maury, have time out of mind and repeatedly, heard advocates defending corporations in personal

injury suits in other counties than Silver Bow (and in Silver Bow for corporations not possessed of this local influence), say in the presence of juries, that they realized that there was a prejudice of the twelve men against their clients in such cases. I therefore aver, having seen such custom unchallenged for now these nineteen years, that if this trial had been going on in the city of Helena, and my adversary had made the same remarks for their client that I made in Silver Bow he would have gone unchallenged, for I have never heard a court rebuke such language.

I know the delicacy of my position. I may say something that will put me in worse attitude than the judgment of the District Court put me. If I had been in contempt of the Court, I made the amende honorable as far as regard for the truth would permit. This should have been sufficient.

In re Perkins, 100 Fed. 951;

4 Enc. Pl. & Pr., 795; idem, 791.

While not claiming the fortitude of Bruno, to be burnt before recanting, yet no fine of \$500.00 is sufficient to reduce me to Galileo's servile denial of the truth.

I stood for and told the truth as I saw it on *voir dire*. I did the same in my opening statement. I did the same thing when charged. I am doing the same thing now. If the Court thinks me wrong and cannot free me from the odium of this unjust sen-

tence, I can console myself with the thought that from one more severe and more unjust, placed upon me in great poverty and obscurity, I have risen by honorable endeavor to a place in the profession envied by many who scorned me then. I can rise again, and prefer to make the attempt to retreating in this Court, or any other Court, from a position justified by my conscience. If the truth cannot free me I can pay the fine and leave the final determination of the justice of my case to the countless thousands who know my life and that of the judge who imposed it. The foregoing is my work. The remainder is my counsels'.

THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE JUDGMENT.

"The sole power of the federal courts to punish for contempt of their authority, both at law and in equity, is derived from Rev. St., Sec. 725" (U. S. Comp. St. 1901 p. 583).

Kirk v. Milwaukee Dust Collector Mfg. Co.,
29 Fed. 505.

That section reads as follows:

"The said court shall have power to impose and administer all necessary oaths, and to punish by fine or imprisonment, at the discretion of the court, contempt of their authority: Provided, that such power to punish contempts shall

not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness or other person, to any lawful writ, process, order, decree, or command of said court."

The first limitation found in the above section is (a) that the punishment shall be limited to fine or imprisonment, (b) *for contempt of their authority*. The second limitation provides, "that such power to punish contempts shall not be construed to extend to any cases except" those specifically mentioned.

"The power of the United States courts in matters of contempt is limited by the provisions of Rev. St. Sec. 725 to punishment by fine or imprisonment."

U. S. v. Atchison T. & S. F. R'y Co., 16 Fed. 853.

"The power of the federal courts is further limited to punish for contempt to cases of misbehavior of any person in the presence of the court, or so near thereto as to obstruct justice, to misbehavior of any officer in official transactions, and to disobedience of any lawful writ."

Ex parte Buskirk, 72 Fed. 14, 18 C. C. A. 410, 25 U. S. App. 613.

"The common law power of federal courts in contempt proceedings is restricted by this section."

"The jurisdiction prescribed by the Act is exclusive and deprives the court of power to punish for any act not enumerated in the statute."

Atwell v. U. S., 162 Fed. 97, 89 C. C. A. 97 reversing 140 Fed. 368.

Cuyler v. Atlantic & N. C. R. Co., 131 Fed. 95.

Ex parte Robinson, 86 U. S. 505, 22 L. Ed. 205-208.

"A proceeding against an attorney as an officer of the court for contempt is a proceeding for a criminal offence, and the guilt of the accused must be proved beyond a reasonable doubt."

In re Cashman, 168 Fed. 1008;

Woodruff v. North Bloomfield Gravel Min. Co., Fed. 129;

Fischer v. Hayes, 6 Fed. 63;

U. S. v. Jose, 63 Fed. 951;

State v. Ralphsnyder, 34 W. Va. 352;

2 Bish. Cr. Law, Sec. 252;

Whart. Cr. Law, Sec. 3426;

Anargyros v. Anargyros & Co., 191 Fed. 208.

THE COURT FAILED TO FIND ANY FACT WHICH CONSTITUTES CONTEMPT OF COURT WITHIN THE MEANING OF THE STATUTE.

The only finding, if it can be called such, in the record herein is found on page 14 of the transcript and is contained in the following language:

"Which language was accompanied by an attitude, demeanor and tone on the part of said H. Loundes Maury the whole of which was thereafter, as herein set out, found by the court to be MISCONDUCT IN OFFICE AS AN ATTORNEY AND COUNSELOR OF THIS COURT OF AND BY SAID H. LOUNDERS MAURY, AND FOUND BY SAID COURT TO CONSTITUTE AND BE CONTEMPT OF THE COURT, COMMITTED IN THE FACE THEREOF.."

Misconduct in office as an attorney and counselor is not one of the grounds designated in the statute as constituting contempt of court. In fact, many acts of misconduct in office by an attorney would not constitute contempt of court at all.

The statute "limits the power of these courts to three classes of cases: 1, where there has been misbehavior of a person in the presence of the courts, or so near thereto as to obstruct the administration of

justice; 2, where there has been misbehavior of any officer of the courts in his official transactions; and 3, where there has been disobedience or resistance by any officer, party, juror, witness or other person, to any lawful writ, process, order, rule, decree or command of the courts. As thus seen, the power of these courts in the punishment of contempts can only be exercised to insure order and decorum in their presence, to secure faithfulness on the part of their officers in their official transactions, and to enforce obedience to their lawful orders, judgments and processes."

Ex parte Robinson, 86 U. S. 505, 22 L. Ed. 205, 208.

The court failed to find that the attorney was guilty of any "misbehavior in its presence, or so near thereto as to obstruct the administration of justice," neither did it find that the attorney was guilty of any "misbehavior as an officer of the court in his official transactions or that he resisted or disobeyed any lawful writ, process, order, decree, or command of said court." Nor is there any finding that that attorney, in any manner, contemned the authority of the court. Neither is there any finding that the attorney intended any disrespect to the court or defiance of its authority. Neither the judgment or the record discloses any criminal intent.

"The offense being criminal in its nature, both the charge, and the finding and judgment of the court

thereon, are to be strictly construed in favor of the accused."

Schwartz v. Superior Court, 11 Cal. 112, 34 Pac. Rep. 580, 582;

In re Riggsbee, 151 Fed. 701, 702;

Reymert v. Smith (Cal. App. 1907), 90 Pac. 470, 5 Cal. App. 280;

"The facts must be stated and findings made before adjudging one guilty of a direct contempt and a failure to make such finding would work a reversal of the judgment and this is the rule even where there is no statute requiring it. The reason is that the reviewing court may see whether or not the facts amount to a contempt."

Hoffman v. Hoffman (S. D.), 127 N. W. 478, 30 L. R. A. (N. S.) 564, and extensive note, and citing Rawson v. Rawson. 35 Ill. App. 505; Ex parte Wright, 65 Ind. 504; Ogden v. State, 3 Neb. 886, 93 N. W. 203, and other cases.

"It is essential in proceedings to punish one for contempt committed in the presence of the court that it should affirmatively appear on the face of the record *'with all the certainty of an indictment or information that an offense has been committed.'*"

"Accordingly where the accused was found guilty of using insulting and menacing language to the court during the trial of a case, and the record, while so stating, failed to set out the language used by the

defendant, it was held to be insufficient to sustain a judgment of conviction."

Ogden v. State, *supra*;

In re McCarty, 154 Cal. 534, 98 Pac., 540.

"It is necessary in a contempt proceeding that the facts be set out and filed. It is not enough that the contemnor's acts be set out in the judgment."

In re Odum, 133 N. C. 250, 45 S. E. 569.

"The power of the court to punish for a contempt of its authority, though, undoubted, is in its nature arbitrary, and its exercise is not to be upheld, except under the circumstances and in the manner prescribed by law. It is essential to the validity of proceedings in contempt that they show a case in point of jurisdiction within the provision of the law, and presumptions and intendments are not to be indulged in their support."

Batchelder v. Moore, 42 Cal. 412;

"Contempt of court is a specific criminal offense and strict construction is made in favor of the defendant. It must be governed by the rule of construction applied in criminal cases."

In re Ellerbe, 13 Fed. 530;

Accumulator Co. v. Consol. Electrical Storage Co., 53 Fed. 793; Kirk v. Milwaukee Dust Collector Mfg. Co., 26 Fed. 501.

In the case last above cited the court said: "A direct contempt is a contempt committed in the face of the court, and may consist of noisy or tumultuous conduct in the presence of the court, or so near there-to as to interrupt its proceedings, or an open defiance of its just powers or authority, or any disrespectful behavior or language to the presiding judge, or any improper conduct tending to defeat or impair the administration of justice."

In the case at bar the record failed to show any "noisy or tumultuous conduct," or any "open defiance of the court's just powers or authority," or any 'disrespectful behavior or language or behavior to the presiding judge, or any improper conduct tending to defeat or impair the administration of justice."

"Contempt of court is an offense the essential ingredients of which are disobedience to the court or despising or opposing its authority or dignity. It may consist of disorderly or insolent behavior or language in the actual presence of the court, in willful disobedience to its mandate, in resisting or evading its process, or in assaulting its officer. So, too, using language which is scornful or reproachful, or which tends to diminish the respect for or authority of the court, or which is likely to obstruct the service or execution of its process or orders is contempt.

A contempt is direct where it is the doing of any improper act in the presence of the court while in session tending directly to disturb the proceedings as

for example, noisy or tumultuous conduct on the part of a person present in the court room or tending to defeat, to disturb or to impair the administration of justice, as for example, open defiance of the powers of the court or disrespectful behavior or language to the judge. It may also consist in the refusal to do a proper act required to be done in open court, where the refusal tends to disturb the proceedings or to defeat the interests of justice."

Ferriman v. People, 128 Ill. App. 230;
 Ex parte Clark, 208 Mo. 121, 106 S. W. 990,
 15 L. R. A. (N. S.) 389n;
 Stuart v. People, 4 Ill. 395.

"Whilst the power to punish for contempt is thus arbitrary and conclusive, it by no means follows that every act which a court declares to be a contempt is in reality one. The power thus vested in a court is necessarily of an arbitrary nature, and should be used with great prudence and caution. A judge should bear in mind that he is engaged, not so much in vindicating his own character, as in promoting the respect due to the administration of the laws; and this consideration should induce him to receive as satisfactory any reasonable apology for an offender's conduct."

People v. Turner, 1 Cal. 152, 153-154.

It is said by an eminent authority on contempt (Oswald Contempt of court 17-19), quoting English judges:

"It should also be borne in mind, in considering and dealing with contempt of court, that it is an offense *sui generis*, and that its punishment involves in most cases an exceptional interference with the liberty of the subject, and that too by a method or process which would in no other case be permissible, or even tolerated. It is highly necessary, therefore, in all questions of this nature, where the functions of the court have to be exercised in a summary manner, that the judge in dealing with the alleged offense should not proceed otherwise than with great caution and deliberation, and only in cases where the administration of justice would be hampered by the delay in proceeding in the ordinary course of law; and that when any antecedent process is to be put in motion every prescribed step and rule, however technical, should be carefully taken, observed and insisted upon. The jurisdiction should be exercised the more carefully in view of the fact that the defendant is usually reduced to such a state of humility, in fear of more severe consequences if he shows any recalcitrancy that he is either unable or unwilling to defend himself as he otherwise might have done.

Sir George Jessel, M. R., referred to the matter in the following terms: "It seems to me that this jurisdiction to commit for contempt, being practically arbitrary and unlimited, should be most jealously and carefully watched and exercised,

if I may say so, with the greatest reluctance and the greatest anxiety on the part of the judges, to see whether there is no other mode which is not open to the objection of arbitrariness, and which can be brought to bear upon the subject. I say that the judge should be most careful to see that the cause cannot be fairly prosecuted to a hearing unless this extreme mode of dealing with persons brought before him on accusations of contempt should be adopted. I have myself had on many occasions to consider this jurisdiction, and I have always thought that, necessary though it be, *it is necessary only in the sense in which extreme measures are sometimes necessary to preserve men's rights, that is if no other pertinent remedy can be found.* Probably that will be discovered after consideration to be the true measure of the exercise of the jurisdiction.

In dealing with an application to commit the publisher of a newspaper for having published some observations on a case while the trial was pending, which were alleged to tend to prejudice the minds of the public against one of the defendants before the hearing, Cotton, L. J., said: "In my opinion, no application to commit for contempt ought to be made unless the offense was so serious as to render the exercise of this summary jurisdiction necessary to prevent interference with the course of justice, and though there be technically a contempt, I cannot see any such fear or serious

interference with the course of justice or prejudice to the defendant as to justify a court in interfering by this summary and arbitrary process."

Quoting further from the same author at pages 58-59, he states:

"Good feeling should always exist between the Bench and Bar; and when it is interrupted the reason for it may be found to exist on both sides. There is scarcely any instance upon record in a superior court of a conflict between the Bench and Bar becoming so acute as to lead to the committal of the defendant for contempt while conducting his client's cause. Even Jeffreys, C. J., who is said to have browbeaten and sometimes threatened counsel, does not appear to have put his power of committal into force against them.

Speaking upon the same subject, the Supreme Court of West Virginia, in *State v. Frew*, 24 W. Va., at page 477, say:

"Having thus shown that this court has power to punish for contempt, it must not be overlooked that this power can be justified by necessity alone, and should rarely be exercised, and never, except when the necessity is plain and unmistakable. It is not given for private advantage of the judges who sit in the court, but to preserve to them that respect and regard of which courts cannot be

deprived and maintain their usefulness. It is given that the law may be administered fairly and impartially, uninterrupted by any influence which might affect the rights of the parties or bias the minds of the judges, that the court may command that respect and sanctity so essential to make the law itself respected, and that the streams of justice may be kept pure and uncorrupted.

The public have a profound interest in the good name and fame of their courts of justice, and especially of the courts of last resort. Everything that affects the well being of organized society, the rights of property, and the life and liberty of the citizen is submitted to their final decision. The confidence of the public in the judiciary should not be wantonly impaired.

We know full well that respect of courts or judges cannot be compelled. 'Respect is a voluntary tribute of the people to worth, virtue and intelligence; and, while these are found on the judgment seat, so long and no longer will courts retain the public confidence.'

Tested by the rules thus announced, no necessity appears in the record for the exercise by the court of this extraordinary power. The attorney was told by the court to desist from the line of statement which he was making or about to make and he promptly obeyed (R., p. 4). And the jury were instructed

by the court and admonished not to be in any manner influenced by the language of counsel, and they evidently followed the instruction. R., p. 3. So that the rights of no litigant were prejudiced or affected. The attorney's statement that he did "not expect more than a hung jury" and that "he could not win in Silver Bow County or expected that he could not," was simply an expression of his opinion and could not deceive or injure any one. It did not furnish occasion for the exercise of the drastic power of the court to impose a fine of \$500 and to order the attorney committed until the amount was paid. The language used by the trial judge clearly shows that he was mistaken as to the nature of the alleged offense, but as to the punishment which it was within his power to summarily administer as well. We have shown in the preceding paragraphs that the power of the court, in contempt proceedings, is limited and restricted by the express provisions of the statute. This is true not only as to the matters which constitute contempt but as to the punishment as well. The judge announced that "while the court believes that it might fittingly suspend you (Maury) for an indefinite period from practice here, it will not do so," etc. R., p. 11. The court has no power to disbar or suspend an attorney for contempt of court in a summary proceeding.

19 Wall (U. S.) 505, 22 L. Ed. 205, Ex parte
Robinson.

"The court has always held that there is no more important duty than to render such a decree as would serve to vindicate the jurisdiction and authority of the courts to enforce orders or to punish acts of disobedience and that the power is to be sparingly used." "But the very amplitude of the power is a warning to use it with discretion and a command never to exert it where it is not necessary or proper."

Gompers v. Buck Stove & Range Co., 221 U. S. 418, 55 L. ed., 797, 807.

"Where an attorney is pursuing in good faith what he supposes to be his right in a court of justice he is not guilty of contempt though he falls into error and violates rules of court and statutes not penal, but, to constitute contempt in such cases, there must be something in the circumstances under which it is done that is disrespectful to the court or a hindrance of the administration of the affairs of the court, and the act must be done wilfully and for an illegitimate or improper purpose."

Hunt v. State, 27 Ohio Cir. Ct. Rep. 16.

In order to constitute a contempt of court, there must be some act coupled with an intended disrespect or defiance.

Fishback v. State, 131 Ind. 304, 30 N. E. Rep. 1088.

"Hasty expressions made on the trial under the

pressure of excitement have been held not to render the attorney liable."

Rapalje, Contempt, Sec. 29, p. 41;

St. Clair v. Piatt Wright (Ohio) 532.

AN ORDER ADJUDGING A PERSON GUILTY OF CONTEMPT MUST SET OUT THE FACTS UPON WHICH THE ADJUDICATION IS BASED OR IT IS VOID.

People ex rel. Field v. Turner, 1 Cal. 152;;

Ex parte Henshaw, 73 Cal. 486, 15 Pas. Rep. 110;

Crites v. State, 74 Neb. 687, 105 N. W. 469;

Ex parte Shortridge, 5 Cal. App. 37-, 90 Pac. Rep. 478;

Crites v. State, 74 Neb. 687, 100 N. W. 469;

Alabany City Bank v. Schermerhorn, 9 Paige, 372, 38 Am. Dec. 551;

Roncovoni v. Gross, 92 App. Div. 366, 86 N. Y. Supp. 1113;

Re Deaton, 105 N. C. 59, 11 S. E. 244;

Ex parte Robertson, 27 Tex. App. 634, 11 Am. St. Rep. 207, 11 S. W. 669;

State v. Pendergast, 39 Wash. 132, 81 Pac. 324;

Ex parte Kearley, 35 Tex. Crim. Rep. 531, 34 S. W. 635.

As heretofore shown this is the rule, whether there is any statute requiring this procedure or not. Authorities might be multiplied indefinitely upon this

point. See cases set out in Vol. IV Enc. Pl. & Pr., Supp. p. 382 and in note 799 (3).

THERE IS NO EVIDENCE IN THE RECORD OF A CRIMINAL INTENT ON THE PART OF THE ACCUSED, AND NO FINDING OF SUCH AND THE JUDGMENT IS VOID.

In this kind of contempt, a contemptuous or criminal intent on the part of the accused is one of the essential ingredients.

"Necessity for proving intent. Where the prosecution is for the commission of a criminal contempt, it is necessary for the prosecution to prove a contemptuous intent on the part of the contemnor."

3 Enc'y Evid. 499 and cases cited.

"Accusations of contempt, where of criminal import, must be supported by evidence sufficient to convince the mind of the trier BEYOND A REASONABLE DOUBT OF THE ACTUAL GUILT OF THE ACCUSED, AND TO ESTABLISH EVERY ELEMENT OF THE OFFENSE INCLUDING THE CRIMINAL INTENT."

(U. S. D. C. Mont.) U. S. v. Carroll, 147 Fed. 947.

"The judgment finding one guilty of contempt must show that the publication was made with the intent of

bringing the court into contempt, and the language used must be found and set out."

In re Deaton, 105 N. Car. 59.

In People v. Aitken, 19 Hun. (N. Y.) 327, the court said:

"If the only purpose of the proceeding is to punish the offender and maintain the dignity of the court, the disobedience must be DESIGNED AND WILLFUL, and hence the law terms this a criminal contempt. The willful disobedience expressed in the statute means conduct *intentionally and designedly* at variance with the mandate of the court, the disobedience need not be malicious but it must be in pursuance of an intent to disregard the mandate of the violated order."

"A criminal contempt is one evincing a deliberate purpose to condemn the authority of the court."

In re Rice, 181 Fed. 217.

There are many cases holding: that "Where defendant is not guilty of willful contempt, a nominal fine and costs only will be imposed."

Morse v. Domestic Sewing Machine Co., 38 Fed. 482;

Iowa Barb Steel Wire Co. v. Southern Barbed Wire Co., 30 Fed. 615.

"To constitute a direct contempt of court there must be some disobedience to its order, judgment or process, or some open and *intended* disrespect to the court or

its officers in the presence of the court, or such conduct in or near the court as to interrupt or interfere with its proceedings, or with the administration of justice."

In re Dill (Kas.), 5 Pac. 39,47.

"A proceeding against an attorney as an officer of the court for contempt is a proceeding for a criminal offense, and the same principles of evidence apply as in other criminal trials, and the guilt of the respondent must be proved beyond a reasonable doubt."

State v. Ralphsnyder, 34 W. Va. 352,12 S. E. 721.

THE ORDER OF THE COURT ADJUDGING MR. MAURY GUILTY OF CONTEMPT AND ORDERING HIM TO PAY A FINE IS VOID BECAUSE IT FAILS TO DESIGNATE ANY PERSON TO WHOM SUCH FINE IS TO BE PAID.

"An order of court adjudging a person guilty of contempt and ordering him to pay a fine, which does not state the person to whom such fine is to be paid, is void."

Smith v. Tenny, 62 Ill. App. 571,576;

McDonald v. People, 86 Ill. App. 558,560;

The Albany City Bank v. Schermerhorn, 9 Paige, 372.

In the case first above cited under this point, the court at page 576, said: 'Who is the money to be

paid to? To the complainants, to the clerk of the court? The answer cannot be found by the order. This is not like a case of an order that is irregular or erroneous in part and should, therefore, be obeyed to the extent of its susceptibility of performance, and as to the remainder, reliance be placed upon the court to modify the order as in *Tolman v. Jones*, 114 Ill. 147, but it is defective in that it is wholly incapable of performance for want of a person to pay to. In such a case it is not incumbent upon the person ordered to pay to apply to the court to make the order an effective one as against himself."

All precedents for such an order, with which we are acquainted, require the person to whom payment is to be made shall be named.

2 Beach Mod. Eq. Pr. 1334-5;

Stimpson v. Putnam, 41 Vt. 238, 243, 244;

3 Dan. Ch. (Star page) 2137, et seq.

THE ORDER OF THE COURT REMANDING THE ATTORNEY INTO THE CUSTODY OF THE UNITED STATES MARSHAL FOR THE DISTRICT OF MONTANA UNTIL SAID FINE IS PAID OR HE IS OTHERWISE DISCHARGED ACCORDING TO LAW IS VOID BECAUSE THERE IS NO FINDING THAT HE IS ABLE TO PAY.

Ex parte Silvia, 123 Cal. 293, 55 Pac. Rep. 988;

It is said in the case last above cited: "Every court being in contempt proceedings, a court of limited jurisdiction, it is essential to the validity of a judgment directing the imprisonment of a person until he complies with an order of court that it be *found that he is able to comply.*"

See also In re Cowden, 139 Cal. 144, 73 Pac. Rep. 156 and cases cited.

The order complained of fixes no time or duration for the imprisonment of the alleged contemnor in case of his inability to pay and for aught that appears, it might continue forever.

"Imprisonment under final commitment for a criminal offense, and its duration should be as certainly defined as that for a sentence for any other crime."

Ex parte Maulsby, 13 Md. 625;

Williamson's case, 26 Pa. St. 9.

"The remarks of the judge are no part of the record."

State ex rel Grice v. District Court, 37 Mont.
590,97 P. 1032-3.

The very object sought to be attained, would be entirely defeated if judgments of this character were allowed to stand. No self-respecting attorney would feel safe to enter upon the trial of a case, lest in the excitement of the trial, he might make some trivial or improper remark or gesture, which would land him in jail for the remainder of his life unless he should be fortunate enough to have \$500 at his command. He might find himself penniless as a result of some word or phrase inadvertently or indiscreetly uttered in the heat of oral argument. The office of an attorney at law is said to be an honorable one and if it continues such, some freedom of action must be allowed him in the presentation of his client's cause and in the assertion of what he honestly believes to be his rights. An attorney who would refrain from proceeding, where he was acting in good faith upon an honest belief that such action was necessary to preserve his client's interests or to maintain his own rights, through fear of consequence, either in the way of disfavor upon the part of the judge or punishment by way of fine and imprisonment, would and ought to be branded as a craven and a poltroon and he would be quite unworthy of his commission as a member of the bar. He would

be recreant to the honorable traditions of the Bar of England and America and which always have been in the van in every movement and effort to resist the tyrannical exercise of arbitrary power by government or its agents.

For the reasons given and under the authorities hereinbefore cited, it is respectfully submitted that the judgment of the court herein is erroneous and should be set aside.

LEWIS P. FORESTELL,
SWAN T. HOGEVOLL,
H. LOWNDES MAURY,

Attorneys for Alleged Contemner.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of the Contempt of
H. LOWNDES MAURY,

Contemnor.

H. LOWNDES MAURY,

Plaintiff in Error,

vs.

No. 2205.

BOSTON AND MONTANA CONSOLI-
DATED COPPER AND SILVER MIN-
ING COMPANY, a Corporation, and THE
UNITED STATES OF AMERICA,

Defendants in Error.

BRIEF AND STATEMENT OF DEFENDANT
IN ERROR, BOSTON AND MONTANA CON-
SOLIDATED COPPER AND SILVER MINING
COMPANY.

In the main action out of which the above entitled
matter arose, the original defendant was the Boston
and Montana Consolidated Copper and Silver Mining

Company, a corporation. About December, 1910, the Anaconda Copper Mining Company assumed all of the obligations of the defendant Boston and Montana Consolidated Copper and Silver Mining Company, including any liability to plaintiff in this action, and it was stipulated and agreed in writing by counsel for the respective parties, which stipulation was filed in this action in the court below, that the Anaconda Copper Mining Company should be substituted as party defendant in the place and stead of the said Boston and Montana Consolidated Copper and Silver Mining Company. We cannot learn that any formal order of substitution was made, but since the filing of said stipulation, the Anaconda Copper Mining Company has been the real party in interest as defendant, and while the proceedings in defense of the action have been conducted in the name of the Boston and Montana Consolidated Copper and Silver Mining Company, they have been carried on in the interest of the real defendant, the Anaconda Copper Mining Company.

In all of the proceedings had upon appeal to this court by Mr. H. Lowndes Maury from the judgment of contempt entered against him in this action, the defendant Boston and Montana Consolidated Copper and Silver Mining Company has been treated as a party to the proceeding, and citation, copy of record and copy of the brief on behalf of Mr. Maury have been served upon the attorneys for the defendant in the cause. This appearance is made and brief filed in

the name of the Boston and Montana Consolidated Copper and Silver Mining Company, but the appearance is in fact for the real party in interest, the Anaconda Copper Mining Company.

Neither the Boston and Montana Company, nor the Anaconda Company, so called for convenience, has any interest whatsoever in the matter of the contempt of Mr. Maury, to review the proceedings upon which, this appeal is taken.

However, in the brief filed on behalf of the contemnor, Mr. Maury, counsel have seen fit to incorporate a statement of alleged facts which are outside of the record, are immaterial, and have no bearing upon the question of the righteousness or unrighteousness of the judgment in contempt entered, but could only serve the purpose of attempting to prejudice the Boston and Montana Company or the Anaconda Company and their rights in this action. Such statements of fact, if true, reflect most seriously, not alone upon the corporations but upon their counsel who appeared for them in the action. For such reasons, and in particular in view of the fact that we have not had and will not directly or indirectly have any participation in the proceedings upon this appeal upon the merits, and know nothing of the defense of the judgment in contempt entered in the court below which will be presented, and as all of the statements of fact above referred to are and were entirely immaterial to the question of contempt to be considered by the court,

the counsel who may appear for said court or judge may not deem it material or necessary for them to controvert or make any reference to these statements; counsel for the said corporations feel that such statements should not pass unchallenged upon this record and that they should be permitted to present this brief and statement as a simple matter of justice.

There is no justification whatsoever for incorporating the matters complained of by us in counsel's brief; whether true or false, they could have no bearing whatsoever upon the question of whether or not the contemnor was guilty of contempt of court, and have no place upon this record. The palpable subterfuge, by which they are introduced upon this record, is found in the statement of contemnor that such facts could have been proven if the contemnor had been given an opportunity so to do in the lower court. The excuse attempted to be given in contemnor's brief for interjecting these matters is found in the following paragraph on page 22 thereof:

"In support of our argument that Maury should have been permitted an opportunity to introduce evidence we believe it is perfectly legitimate to state a supposed case of what might have been proven. We cannot see why it is necessary, in stating a supposed case, to draw upon the imagination in preference to what might have been proven as actual facts in this case. We are going to state what could have been proven in evidence in complete justification of Maury's position and

language as if all the facts were imaginary. The fact is that our supposed case corresponds exactly with the truth."

And in the following paragraph on page 26:

"The foregoing facts are fair argument on the question of the right of Maury to put in evidence and to have time to do so."

The inference attempted to be given by these statements in the brief, that is, that the contemnor Maury sought or asked an opportunity to introduce evidence, either before the passing upon him of the judgment of contempt or at any stage of the proceedings which led up to said contempt judgment or afterwards, is untrue and unjustified upon the record and the record absolutely shows the contrary. When Mr. Maury was called upon by the court to show cause why he should not be punished for contempt (Tr. pps. 6-10), he made a statement, but made no reference whatsoever to any desire to introduce evidence, and the only request made by him was in connection with his suggestion that the honorable judge of the District Court was in the habit of erring through being driven by haste in reaching rapid conclusions, the request being that the judge take the matter under advisement before passing judgment (Tr. page 10, subd. 10). The said facts which counsel suppose may be considered as having been proven in the lower court plainly would have no bearing whatsoever upon the question of con-

temnor's guilt, but the incorporation of such libelous statements in counsel's brief upon this appeal is entirely unjustified from every standpoint; the facts were not before the lower court, no attempt or request of the lower court to prove them was made, and as we shall show the statements are untrue and could not have been established by evidence in the lower court if counsel had been given an opportunity to do so and the evidence had been regarded by the lower court as in any wise material.

These statements, which are found upon pages 22-25 of contemnor's brief, as to the number of men employed by the defendant companies in Silver Bow and Deer Lodge counties, the comparative number of men employed by other employers, the statement of the interests of the defendant companies in these two counties, and particularly of the facts tending to show dominance of business and industrial interests in these two counties by either or both of the defendant corporations, their activity in politics, the statement of the number of men killed or injured by those corporations, the statement of the history of litigations against those corporations in the Montana courts and regarding the political primary incident are each and all untrue, both literally and in substance.

The statement regarding one particular man upon the jury in this action, particularly in so far as they refer to the defendants, or any connection or relation of theirs with him, and in the main the statements

on the whole, and any statement that this man or any other member of the jury was absolutely or thoroughly or at all within the control or influence of the defendants or either of the corporations whom we represent, are absolutely untrue. At the time of the making of the second statement by the contemnor which was held by the lower court to be contemptuous, the jurors had been fully examined, the jury selected and sworn; thus the record in this case absolutely precludes any possibility of this condition existing as to any juror, and during the trial no attempt was made to show such a condition in the lower court and no evidence could have been produced establishing such condition. If contemnor had or has knowledge or information sufficient to justify his incorporating these statements as to members of the jury in his brief before this Court, how can he justify his acceptance of the jury without calling the attention of the lower court to such facts, upon examination of the jurors, or by offer of proof, or otherwise, and can there be any doubt but that contemnor would have done so, if there had been the slightest foundation in fact for these charges?

The statement that the presiding judge of the court below announced in open court that the decision of this court to the effect that similar testimony was sufficient to take the case to the jury was wrong or that the case should be non-suited, is also an absolute departure from the fact. The court made no such

remark or intimation but promptly overruled defendant's motions and sent the case to the jury. The statement upon page 26 of contemnor's brief, that the lower court, in his remark, that there was no quarrel with much or perhaps all of the contemnor's statement at the time of the rendering of the sentence of contempt, admitted the truth of any of these charges in contemnor's brief, is equally surprising and unfounded. In the first place contemnor did not in the lower court make any statement of fact along the lines gone into in this portion of his brief, but simply tried to excuse his conduct by stating his belief and feeling. In the second place, it is plain from the remarks of the presiding judge, that the court did not intend to be understood as expressing an opinion upon the correctness or incorrectness of the statements of contemnor, but simply indicated that the time and place chosen by contemnor was not the proper time or place for any controversy as to such matters. It is almost inconceivable that contemnor or his counsel realize that by placing such interpretation upon the court's remarks, they are charging that the Honorable Presiding Judge below, with full knowledge and appreciation of the fact that plaintiffs could not have a fair and impartial trial in Silver Bow County, and particularly before the jury then empanelled, yet required or permitted such trial to proceed.

The statement upon page 25 of counsel's brief to the effect that any attorney for the defendant or any-

one else to the knowledge of any attorney for the defendant said to the said Maury "Wait until the election is over and this will be remitted," is untrue. No attorney for the defendant made any such statement or any statement which could have been understood by any person of ordinary intelligence to this effect, nor was any statement made to the said Maury by any attorney for the defendant which would justify this statement or the reference to it in counsel's brief. In short, we challenge, as untrue, each and every statement of contemnor, or his counsel, found either upon the record or brief, stating or insinuating that there is or has been any condition or fact, which prevented or would in any wise tend to prevent the plaintiff from having an absolutely fair trial in this action.

It is true, as stated in contemnor's brief, that the jury returned a unanimous verdict for defendant, and it is also true that this jury, which occupied more than five hours and returned for further instructions before rendering its verdict, had among its members six residing in localities far removed from the Cities of Butte and Anaconda, and from any possible influence of the defendant corporation.

Such charges, as those above referred to in counsel's brief, defendant and its counsel are now ready and have at all times been ready to meet by evidence at any time or place. In fact those charges, as shown by the statement of contemnor, at the time the contempt sentence was passed (Trans. p. 9) have been definitely made and judicially determined to be un-

founded in this very action. Under the practice in the Circuit Court for the District of Montana, it was the practice and is the practice of the District Court now to hold terms of court at the City of Butte in Silver Bow County, and also at the City of Helena, in Lewis and Clark County, Montana; it was then and is yet the practice to file in the first place and afterwards to have tried at Butte the cases which originate in Silver Bow County or adjoining counties. This action should have been filed in Silver Bow County, all of the parties residing there and the accident complained of having occurred there, but Mr. Maury, counsel for the plaintiff, filed the same at Helena. The defendant Boston and Montana Company made a motion to the court to transfer the cause to Silver Bow County for trial, and in opposition to this motion, plaintiff, through her counsel Mr. Maury, filed numerous affidavits, making the same charge of domination and undue influence on the part of the defendant corporation in Silver Bow County, and endeavored to prove the same, necessarily producing all the evidence possible of being produced, and went fully into the charge that because of substantially the same matters which are set up in this brief, the plaintiff could not have a fair trial in Silver Bow County. The defendant corporation, the Boston and Montana Company, met this charge and filed affidavits and introduced other evidence and the matter was fully heard and determined in said Circuit Court, Hon. William H. Hunt, Judge presiding. At the conclusion of the hearing the judge

rendered his decision, finding such charges to be unfounded, and ordered the case transferred to Silver Bow County for trial. A copy of this order, so entered, is as follows:

"In the Circuit Court of the United States, Ninth Circuit District of Montana.

31st day of April Term, 1909. Thursday, June 17th, 1909. In open court.

No. 906, Myrtle Northam and Hedley Northam,
Plaintiffs,

vs.

Boston and Montana Copper and Silver Mining Co., a Corporation, Defendant.

This cause, heretofore submitted to the court upon motion of defendant to transfer said cause from records at Helena, Montana, to records of Butte, Montana, came on regularly at this time for the decision of the court, and after due consideration, it is ordered that said motion be granted and cause ordered transferred. Exception of plaintiff to said ruling noticed.

Entered in open court, June 17th, 1909.

Geo. W. Sproule, Clerk.

Attest:

A true copy of order:

Geo. W. Sproule, Clerk.

By C. R. Garlow,

Deputy Clerk."

(Seal)

This matter was heard and determined long before the first trial of the case, the proceedings upon which trial were by this court reviewed upon the former appeal.

If there were conditions existing in Silver Bow or the adjoining counties, which even approached in any degree the situation stated by counsel upon pages 22-25 of their brief, it is impossible to conceive that any court would require litigants against the defendant corporations to try their causes there, and the fact that in this and other causes trials have been proceeded with against the defendant corporations in Silver Bow County, is of itself sufficient to show the unjustifiable character of those statements, but in the present case their interjection into contemnor's brief is further condemned by the fact that there has been in this action, in a proceeding had in the proper way, a judicial determination to the contrary, and we cannot permit to pass unchallenged the attempt of the contemnor to justify through the insertion in his brief of these extraneous and untrue statements, the unethical, unprofessional and unjustified attempt of contemnor to influence the jury upon the trial in the above action by remarks which the lower court of its own motion found to be contemptuous. As to the view that should fairly be taken of the conduct of an attorney, who would deliberately and inexcusably insult the lower court and the members of the trial jury, all other courts of Silver Bow County, the citizenship

of the residents of Silver Bow and Deer Lodge Counties, and defendants and their counsel, as contemnor has done by inserting such statements in his brief, we have no comment to offer.

We respectfully ask the court to consider this brief as it is presented, not for the purpose of affecting in any way the decision of this court upon the merits of contemnor's appeal, but simply for the purpose of righting an injustice attempted to be done the defendant corporations and their counsel upon this record.

Respectfully submitted.

C. F. KELLEY,

L. O. EVANS,

W. B. RODGERS and

D. GAY STIVERS,

Attorneys for Boston and Montana Consolidated Copper and Silver Mining Company and the Anaconda Copper Mining Company, substituted defendant.

United States
Circuit Court of Appeals
For the Ninth Circuit.

ALFRED J. PRITCHARD,

Appellant,

vs.

GEORGE K. McLEOD, THE FAIRHAVEN
WATER COMPANY, a Corporation, JOHN
DOE and RICHARD ROE,

Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for
the District of Alaska, Second Division.

FILED

DEC 30 1912

No. 2206

United States

Circuit Court of Appeals

For the Ninth Circuit.

ALFRED J. PRITCHARD,

Appellant,

vs.

GEORGE K. McLEOD, THE FAIRHAVEN
WATER COMPANY, a Corporation, JOHN
DOE and RICHARD ROE,

Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for
the District of Alaska, Second Division.

INDEX TO PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

	Page
Assignment of Errors.....	15
Attorneys of Record, Names and Addresses of.	1
Certificate of Clerk U. S. District Court to Rec- ord, etc.	23
Citation.....	24
Complaint.....	1
Demurrer of Fairhaven Water Co.....	12
Demurrer of Geo. K. McLeod.....	10
Exhibit "A" to Complaint (Agreement Dated April 7, 1908, Between Alfred J. Pritchard and George K. McLeod).....	6
Judgment.....	14
Minutes—September 4, 1912—Re Order Sus- taining Demurrers.....	13
Names and Addresses of Attorneys of Record..	1
Order Enlarging Time to December 21, 1912, to File Record, etc.....	26
Order Allowing Appeal and Fixing Amount of Bond.....	18
Order Sustaining Demurrers.....	13
Petition for an Order Allowing Appeal.....	16
Praecipe for Certified Copy of Record.....	22
Summons.....	9
Undertaking.....	19

[Names and Addresses of] Attorneys of Record.

G. J. LOMEN, Nome, Alaska,

WILLIAM H. GORHAM, 811 First Ave., Seattle,
Wash.,

Attorneys for Plaintiff and Appellant.

IRA D. ORTON, Colman Bldg., Seattle, Wash.,

Attorney for Defendants and Appellees.

*In the District Court for the District of Alaska,
Second Division.*

No. —.

ALFRED J. PRITCHARD,

Plaintiff,

vs.

GEORGE K. McLEOD, THE FAIRHAVEN
WATER COMPANY, a Corporation, JOHN
DOE and RICHARD ROE,

Defendants.

Complaint.

Now comes the plaintiff above named, and complains and alleges as follows:

I.

That the defendant the Fairhaven Water Company is a corporation duly created and organized under the laws of the State of New York, and doing business in the District of Alaska.

II.

That the names of the defendants John Doe and Richard Roe are fictitious, the true names of said defendants being unknown to plaintiff, and plaintiff asks that when their true names are discovered, that

such names be substituted for said fictitious names.

III.

That on or about the 7th day of April, 1908, the above-named plaintiff was, and still is, the owner in fee, subject to the paramount title of the United States, and in the possession of certain real property hereinafter described, and the personal property herein mentioned. [1*]

IV.

That the defendant George K. McLeod, being desirous to purchase said premises and real property, entered into an agreement in writing with the plaintiff, dated on the day last above mentioned; that a copy of said agreement is attached hereto, marked Exhibit "A," and made a part hereof.

V.

That as a part of said agreement, the defendant George K. McLeod made, executed and delivered to said plaintiff the certain promissory notes in said agreement mentioned; that one of said notes was dated New York, April 7th, 1908, wherein and whereby, for value received, said George K. McLeod promised to pay to the order of said plaintiff, on November 6th, 1908, the sum of Fifteen Hundred Dollars (\$1500.00); that the other of said notes was also dated New York, April 7th, 1908, and wherein and whereby said defendant George K. McLeod, for value received, promised to pay to the order of said plaintiff, on the 6th day of April, 1909, the sum of Twenty-five Hundred Dollars (\$2500.00). That plaintiff is the holder of said notes.

*Page-number appearing at foot of page of original certified Record.

VI.

That the defendant then and there paid to the plaintiff the sum of one thousand dollars mentioned in said agreement.

VII.

That the personal property mentioned in said agreement was duly delivered to the said defendant George K. McLeod. That the *lots placer* mining claims and water rights mentioned in said agreement, situated in the Fairhaven Mining and Recording District, District of Alaska, are more particularly known and described as follows: [2]

The Homestake Bench Claim, situate and being on the left limit adjoining the Homestake Creek Claim on Inmachuk River;

The upper one-half of the Nellie Claim, situate and being on Inmachuk River;

The Bradley Fraction, situate and being on the right limit of Inmachuk River;

An undivided one-eighth interest in and to the Croeseus Group, situate and being on the benches on the right limit near the mouth of Candle Creek;

All the interest of the plaintiff in and to that certain water right on Arizona Creek, a tributary of Inmachuk River;

That certain house and lot, situate and being on the sand spit at Deering, Alaska, owned by the plaintiff on April 7th, 1908;

VIII.

That the defendant has neglected and refused to pay the said several sums mentioned in said promissory notes, or any part thereof, and has neglected

and refused to pay twenty-five per cent of the gross output of gold taken from any of the claims mentioned in said agreement, or any part thereof, until the sum of twenty-five thousand dollars should be paid in full, or at all; that it was understood and agreed that said twenty-five thousand dollars mentioned in said agreement should be paid within a reasonable time; that more than a reasonable time has elapsed since the making of said agreement, and that defendant George K. McLeod has neglected to mine said premises or to extract gold therefrom, whereby and on account of which all of said moneys are now due and payable. [3]

IX.

That the plaintiff has always been, and still is, ready and willing to perform the agreement above mentioned on his part, and on being paid the remainder of said purchase money with interest from the date of the filing of this complaint, at the rate of eight per cent per annum, to convey said premises as provided in and by said agreement, and to let the defendant George K. McLeod into the possession of said premises and the rents and profits thereof, from the date of said agreement.

X.

That on the 26th day of July, 1912, in the District of Alaska, the plaintiff duly tendered to the defendant George K. McLeod a deed of the premises above mentioned, but the defendant then, and ever since, has refused to accept the same and to pay to the plaintiff the balance of the purchase money above mentioned.

XI.

That the defendants The Fairhaven Water Company, John Doe and Richard Roe claim some right, title and interest in and to said premises, but that their claims, if any they have, are junior and subordinate to the rights and claims of the plaintiff herein.

WHEREFORE, the plaintiff demands judgment (1) that the defendant George K. McLeod perform said agreement and pay to the plaintiff the sum of twenty-nine thousand dollars, the remainder of said purchase money, with interest thereon from the date of the filing of this complaint, and for the costs and disbursements of this action. (2) That if *the* George K. McLeod will not accept the conveyance and pay said purchase money, then that the premises above [4] mentioned be sold and that the proceeds be applied to the payment of the same with the costs of this action; that the defendant George K. McLeod be required to pay the deficiency, if any.

G. J. LOMEN,
Attorney for Plaintiff.

United States of America,
District of Alaska,
Fairhaven Precinct,—ss.

Alfred J. Pritchard, being first duly sworn, according to law, deposes and says:

That he is the plaintiff named in the foregoing complaint; that he has read the same, knows the contents thereof, and that the same are true as he verily believes.

ALFRED J. PRITCHARD.

Subscribed and sworn to before me this the 9th day of August, 1912.

[Notarial Seal] GEO. D. CAMPBELL,
Notary Public in and for the District of Alaska, Re-
siding at Candle. [5]

Exhibit "A" [to Complaint].

MEMORANDUM OF AGREEMENT made and entered into this seventh (7) day of April, Nineteen hundred and eight (1908) between ALFRED J. PRITCHARD, of Seattle, Washington, the party of the first part, and GEORGE K. McLEOD, 31 Nassan Street, New York, the party of the second part,

WHEREAS, the party of the first part agrees to sell and the party of the second part agrees to buy all the placer mining claims (with the exception of one certain claim in the vicinity of Dearborn Discovery on the Inmachuk), also warehouses, houses, stables, china and centrifugal pumps, boilers, engines, one horse, scows, tents, forges, stoves, hose, belts machinery and tools of every description; camp outfit of every description and lots and water rights owned by said party of the first part in the Fairhaven Mining District, District of Alaska, for the sum of Thirty Thousand Dollars (\$30,000.00) upon the following terms and conditions:

1. One Thousand Dollars (\$1,000) down, the receipt whereof is hereby acknowledged.

2. One Thousand Five Hundred Dollars (\$1,500) note due and payable on November 6th, 1908.

3. Two Thousand Five Hundred Dollars, (\$2,500) note due and payable April 6th, 1909.

4. Twenty-five (25) per cent. of the gross output

of gold taken from any of the claims or fractions of claims sold by the party of the first part to the aforesaid party of the second part to be paid over upon demand to said party of the first part until the sum of Twenty-five Thousand [6] Dollars (\$25,000) is paid in full.

5. That the party of the first part upon his return to Seattle will execute quit claim deeds subject to the conditions of this agreement in favor of said party of the second part to cover aforesaid mentioned placer mining claims, lots, water rights and bill of sale of all personal property above outlined.

6. The proceeds of any articles of camp equipment that have been sold by the agent of the party of the first part previous to the date of this agreement to belong to the party of the first part.

7. The proceeds of any articles that may be sold after the date of this agreement to belong to the party of the second part.

8. That the party of the second part will allow H. I. Dearborn the use of horse to clean up his winter dump.

9. That the party of the first part will execute an order to his agent to turn over everything to the party of the second part.

10. The intent and purpose of this agreement is that the party of the first part sells to party of the second part all his real and personal property of whatsoever nature, kind or description now owned by party of the first part in the said Fairhaven Mining District, District of Alaska, and said party of the first part undertakes to execute all necessary

deeds and transfers when called upon to do so with the sole exception of one placer mining claim near [7] Dearborn's Discovery (so-called) on the lower Inmachuk River.

Signed and sealed and delivered the day and year first above written.

(Signed) ALFRED J. PRITCHARD. [Seal]

GEORGE K. McLEOD. [Seal]

In presence of:

GEO. W. CHUYON.

ELFRIEDE V. LOURY.

[Endorsed]: #2392. In the District Court for the District of Alaska, Second Division. Alfred J. Pritchard, Plaintiff, vs. George K. McLeod et al., Defendants. Complaint. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Aug. 14, 1912. John Sundback, Clerk. By ———, Deputy. G. J. Lomen, Atty. for Pltf. [8]

*In the District Court for the District of Alaska,
Second Division.*

No. —

ALFRED J. PRITCHARD,

Plaintiff,

vs.

GEORGE K. McLEOD, THE FAIRHAVEN
WATER COMPANY, a Corporation, JOHN
DOE and RICHARD ROE,

Defendants.

Summons.

The President of the United States of America, to
George K. McLeod, The Fairhaven Water Com-
pany, a Corporation, John Doe and Richard
Roe, Greeting:

You are hereby summoned and required to appear
and answer the complaint of the plaintiff on file in
the office of the clerk of said court, at the city of
Nome, in said District, within thirty days from the
service of this summons upon you, or judgment for
want thereof will be taken against you; and you are
hereby notified that if you fail to answer the said
complaint, the plaintiff will apply to the Court for
the relief demanded in said complaint.

WITNESS the Honorable CORNELIUS D.
MURANE, Judge of the District Court, for the Dis-
trict of Alaska, Second Division, and the seal of said
Court hereto affixed, this the 14th day of August,
1912.

[Court Seal]

J. SUNDBACK,

Clerk of the District Court for the District of Alaska,
Second Division.

By J. Allison Bruner,

Deputy Clerk. [9]

United States of America,
District of Alaska,
Second Division,—ss.

I hereby certify that I received the annexed sum-
mons on the 14th day of August, 1912, and thereafter
on the same date I served the same at Nome, Alaska,
upon The Fairhaven Water Company by delivering

to and leaving with George K. McLeod, General Manager of said company, a copy thereof, together with a certified copy of the complaint filed therein; and thereafter on the same date I served the same at Nome, Alaska, upon George K. McLeod, by delivering to and leaving with him a copy thereof, together with a certified copy of the complaint filed therein.

Returned this 14th day of August, 1912.

T. C. POWELL,

United States Marshal.

MARSHAL'S COSTS:

2 Services\$12.00

[Endorsed]: In the District Court for the District of Alaska, Second Division. Alfred J. Pritchard, Plaintiff, vs. George K. McLeod et al., Defendants. Summons. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Aug. 15, 1912. John Sundback, Clerk. By J. A. B., Deputy. G. J. Lomen, Atty. for Pltf. 3410. [10]

*In the District Court for the District of Alaska,
Second Division.*

ALFRED J. PRITCHARD,

Plaintiff,

vs.

GEO. K. McLEOD et al.,

Defendants.

Demurrer [of Geo. K. McLeod].

Comes now Geo. K. McLeod, one of the defendants in the above-entitled action, and demurs to the

plaintiff's complaint filed herein, and for ground of demurrer alleges:

I.

That said complaint does not state facts sufficient to constitute a cause of action against him.

WHEREFORE, said defendant prays that the above-entitled action be dismissed.

IRA D. ORTON,

Attorney for Deft. Geo. K. McLeod. [11]

United States of America,

District of Alaska,—ss.

Due service of the within demurrer is hereby accepted at Nome, Alaska, this 22d day of August, 1912, by receiving a copy thereof.

G. J. LOMEN,

O. D. C.,

Attorney for Plaintiff.

[Endorsed]: #2392. Original. In the District Court for the District of Alaska, Second Division. Alfred J. Pritchard, Plaintiff, vs. Geo. K. McLeod et al., Defendants. Demurrer of Deft. Geo. K. McLeod. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Aug. 22, 1912. John Sundback, Clerk. By _____, Deputy. Ira D. Orton, Attorney for Deft. [12]

*In the District Court for the District of Alaska,
Second Division.*

ALFRED J. PRITCHARD,

Plaintiff,

vs.

GEO. K. McLEOD et al.,

Defendants.

Demurrer [of Fairhaven Water Co.].

Comes now the Fairhaven Water Company, one of the defendants in the above-entitled action, and demurs to the plaintiff's complaint filed herein, and for ground of demurrer alleges:

I.

That said complaint does not state facts sufficient to constitute a cause of action against it.

WHEREFORE, said defendant prays that the above-entitled action be dismissed.

IRA D. ORTON,

Attorney for Deft. Fairhaven Water Co. [13]

United States of America,

District of Alaska,—ss.

Due service of the within demurrer is hereby accepted at Nome, Alaska, this 22d day of ———, 1912, by receiving a copy thereof.

G. J. LOMEN,

O. D. C.,

Attorney for Plaintiff.

[Endorsed]: #2392. In the District Court for the District of Alaska, Second Division. Alfred J. Pritchard, Plaintiff, vs. Geo. K. McLeod et al., De-

fendants. Demurrer of Defendant Fairhaven Water Co. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Aug. 22, 1912. John Sundback, Clerk. By _____, Deputy. Ira D. Orton, Attorney for Deft. [14]

[Minutes—Sept. 4, 1912—Re Order Sustaining Demurrers.]

*In the District Court for the District of Alaska,
Second Division.*

Term Minutes, Special August, 1912, Term, Beginning August 15, 1912.

Wednesday, September 4, 1912, at 10 A. M.

Court convened pursuant to adjournment. Hon. THOMAS R. LYONS, District Judge, presiding.

Upon the convening of court the following proceedings were had:

* * * * *

2392.

PRITCHARD

vs.

McLEOD et al.

The Court having under consideration the demurrers of defendants Geo. K. McLeod and Fairhaven Water Company to the complaint on file herein, made an order sustaining said demurrers. [15]

*In the District Court, District of Alaska, Second
Division.*

ALFRED J. PRITCHARD,

Plaintiff,

vs.

GEORGE K. McLEOD, THE FAIRHAVEN
WATER COMPANY, a Corporation, JOHN
DOE and RICHARD ROE,

Defendants.

Judgment.

The above-entitled action coming on to be heard upon the application of the defendants, Geo. K. McLeod and the Fairhaven Water Co., that judgment be entered herein, and it appearing to the Court that the demurrers of the defendants Geo. K. McLeod and the Fairhaven Water Co. to plaintiff's complaint heretofore filed herein, were on the 4th day of September, 1912, sustained by the Court, and the plaintiff having declined to amend said complaint,

IT IS BY THE COURT ORDERED, ADJUDGED AND DECREED that this action be, and the same is hereby dismissed, to which plaintiff duly excepted.

IT IS FURTHER ordered that the defendants, Geo. K. McLeod and the Fairhaven Water Co., have and recover of and from the plaintiff herein, their costs and disbursements of suit taxed at \$.

Done in open court at Nome, Alaska, this 6th day of September, 1912.

THOMAS R. LYONS,
U. S. District Judge.

[Endorsed]: #2392. In the District Court for the District of Alaska, Second Division. Alfred J. Pritchard, Plaintiff, vs. Geo. K. McLeod et al., Defendants. Judgment. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Sep. 6, 1912. John Sundback, Clerk. By J. A. B., Deputy. Ira D. Orton, Attorney for Defts. Vol. 9, Orders & Judgments, p. 568. [16]

*In the District Court for the District of Alaska,
Second Division.*

ALFRED J. PRITCHARD,

Plaintiff,

vs.

GEORGE K. McLEOD, THE FAIRHAVEN
WATER COMPANY, a Corporation, JOHN
DOE and RICHARD ROE,

Defendants.

Assignment of Errors.

Comes now the plaintiff, Alfred J. Pritchard, and assigns the following errors upon which he will rely in prosecuting his appeal from the final judgment in the above-entitled action, to the Circuit Court of Appeals for the Ninth Circuit.

FIRST: The Court erred in sustaining the demurrer of the defendants, George K. McLeod and of the Fairhaven Water Company.

SECOND: The Court erred in filing and entering its final decree and judgment dismissing said action in favor of said defendants and against the plaintiff, over the objection of plaintiff.

WHEREFORE said plaintiff prays that said judgment of the District Court for the District of Alaska, Second Division, be reversed and set aside.

G. J. LOMEN,

Attorney for Plaintiff.

Due service of the foregoing assignment of errors is hereby acknowledged at Nome, Alaska, by receipt of copy, this 21st day of October, 1912.

IRA D. ORTON,

Attorney for Defendants. [17]

[Endorsed]: No. 2392. In the District Court for the District of Alaska, Second Division. Alfred J. Pritchard, Plaintiff, vs. George K. McLeod et al., Defendants. Assignment of Errors. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Oct. 21, 1912. John Sundback, Clerk. By J. A. B., Deputy. G. J. Lomen, Attorney for Plaintiff, Nome, Alaska. [18]

*In the District Court for the District of Alaska,
Second Division.*

ALFRED J. PRITCHARD,

Plaintiff,

vs.

GEORGE K. McLEOD, THE FAIRHAVEN
WATER COMPANY, a Corporation, JOHN
DOE and RICHARD ROE,

Defendants.

Petition for an Order Allowing Appeal.

Comes now the plaintiff above named, and feeling himself aggrieved by the final judgment and decree

made and entered in the above-entitled cause on the 6th day of September, 1912, dismissing said action in favor of said defendants and against said plaintiff, does hereby appeal from said final judgment and decree, and from the whole and every part thereof, to the United States Circuit Court of Appeals for the Ninth Circuit, and prays that this his appeal may be allowed. That a transcript of the proceedings upon which the said judgment and decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

Appellant further prays for an order fixing the amount of costs and appeal bond to be given by said appellant upon said appeal.

Dated at Nome, Alaska, this 21st day of October, 1912.

G. J. LOMEN,
Attorney for Plaintiff.

Service of the above and foregoing petition is hereby admitted by receipt of copy this 21st day of October, 1912.

IRA D. ORTON,
Attorney for Defendant. [19]

[Endorsed]: No. 2392. In the District Court for the District of Alaska, Second Division. Alfred J. Pritchard, Plaintiff, vs. George K. McLeod et al., Defendants. Petition for an Order Allowing Appeal. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Oct. 21, 1912. John Sundback, Clerk. By J. A. B., Deputy. G. J. Lomen, Attorney for Plaintiff. Nome, Alaska. [20]

*In the District Court for the District of Alaska,
Second Division.*

ALFRED J. PRITCHARD,

Plaintiff,

vs.

GEORGE K. McLEOD, THE FAIRHAVEN
WATER COMPANY, a Corporation, JOHN
DOE and RICHARD ROE,

Defendants.

Order Allowing Appeal and Fixing Amount of Bond.

Upon motion of G. J. Lomen, attorney for plaintiff above named, it is

ORDERED that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the final judgment and decree heretofore filed and entered upon the 6th day of September, 1912, be, and is hereby allowed, and that a certified transcript of the records, orders and proceedings herein, be forthwith transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, and it is further

ORDERED that a bond be given by the plaintiff to the defendant in the sum of two hundred and fifty dollars.

Done in open court this the 21st day of October, 1912.

CORNELIUS D. MURANE,

District Judge.

Service of the above order is hereby admitted by receipt of copy this 21st day of October, 1912.

IRA D. ORTON,

Attorney for Defendants. [21]

[Endorsed]: No. 2392. In the District Court for the District of Alaska, Second Division. Alfred J. Pritchard, Plaintiff, vs. George K. McLeod et al., Defendants. Order Allowing Appeal and Fixing Amount of Bond. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Oct. 21, 1912. John Sundback, Clerk. By J. A. B., Deputy. G. J. Lomen, Attorney for Plaintiff. Nome, Alaska. [22]

In the District Court for the District of Alaska, Second Division.

ALFRED J. PRITCHARD,

Plaintiff,

vs.

GEO. K. McLEOD, THE FAIRHAVEN WATER
COMPANY, a Corporation, JOHN DOE and
RICHARD ROE,

Defendants.

Undertaking.

KNOW ALL MEN BY THESE PRESENTS, that we, Alfred J. Pritchard, as principal, and J. H. Mustard and Jafet Lindeberg, sureties, are held and firmly bound unto the defendants above named in the sum of two hundred and fifty dollars, to be paid to the said defendants, their heirs, executors or assigns, the payment of which well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, administrators and assigns, firmly by these presents.

Sealed with our seals and dated this 21st day of October, 1912.

The condition of the above undertaking and obligation is,

THAT WHEREAS the above-named plaintiff, Alfred J. Pritchard, is about to file his petition for an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment of dismissal in [23] the above-entitled action rendered by the District Court for the District of Alaska, Second Division, on the 6th day of September, 1912, and

WHEREAS the said plaintiff desires to secure the defendants in the payment of its costs, now

THEREFORE, if the above-named plaintiff, Alfred J. Pritchard, shall prosecute the said appeal to effect, and answer all costs and damages if he fail to make good his appeal, and shall pay or cause to be paid to the said defendants, their heirs, successors, administrators and assigns, all damages which they shall suffer by reason of said appeal if the same should be wrongful or without sufficient cause; then this obligation to be void, otherwise to remain in full force and effect.

ALFRED J. PRITCHARD,

Principal.

J. H. MUSTARD,

JAFET LINDEBERG,

Sureties.

United States of America,

District of Alaska,—ss.

J. H. Mustard and Jafet Lindeberg, being first

duly sworn, each for himself, deposes and says:

That I am one of the sureties named in the above [24] undertaking, and am a resident of the District of Alaska. That I am not an attorney at law, marshal, deputy marshal, clerk of any court, or other officer of any court, and am worth the sum of five hundred dollars over and above all just debts and liabilities, and exclusive of property exempt from execution.

J. H. MUSTARD.

JAFET LINDEBERG.

Subscribed and sworn to before me this the 21st day of October, 1912.

[Seal]

G. J. LOMEN,

Notary Public in and for the District of Alaska.

ORDERED: That the above and foregoing undertaking, and the sureties therein named, are hereby approved this 21st day of October, 1912.

Done in open court this 21st day of October, 1912.

CORNELIUS D. MURANE,

District Judge.

[Endorsed]: No. 2392. In the District Court for the District of Alaska, Second Division. Alfred J. Pritchard, Plaintiff, vs. Geo. K. McLeod et al., Defendants. Undertaking. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Oct. 21, 1912. John Sundback, Clerk. By ———, Deputy. G. J. Lomen, Attorney for Plaintiff. Nome, Alaska. [25]

UNITED STATES OF AMERICA.

District Court, District of Alaska, ———— Division.
Cause No. ———.

ALFRED J. PRITCHARD,

Plaintiff,

vs.

GEO. K. McLEOD et al.,

Defendants.

Praecipe [for Certified Copy of Record].

To the Clerk of the Above-entitled Court:

You will please make and send to the Clerk of the Circuit Court of Appeals certified copy of record in the above-entitled action, including pleadings, judgment and minute order sustaining demurrers, also of all appeal papers, including original citation and order enlarging time to file record on appeal.

G. J. LOMEN,

Atty. for Plff.

[Endorsed]: Cause No. 2392. District Court, District of Alaska, 2nd Division. Alfred J. Pritchard, Plaintiff, vs. Geo. K. McLeod et al., Defendants. Praecipe. Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome. Oct. 21, 1912. John Sundback, Clerk. By J. A. B., Deputy. G. J. Lomen, Atty. for Plff. Nome, Alaska. [26]

*In the District Court for the District of Alaska,
Second Division.*

No. 2392.

ALFRED J. PRITCHARD, ,

Plaintiff,

vs.

GEORGE K. McLEOD, THE FAIRHAVEN
WATER COMPANY, a Corporation, JOHN
DOE and RICHARD ROE,

Defendants.

**Certificate [of Clerk U. S. District Court to Record,
etc.].**

I, John Sundback, Clerk of the District Court of Alaska, Second Division, do hereby certify that the foregoing typewritten pages, from 1 to 26, inclusive, are a true and exact transcript of the Complaint, Summons, Demurrer of Defendant Geo. K. McLeod, Demurrer of Defendant Fairhaven Water Co., Court Minutes of September 4, 1912 (Sustaining Demurrers), Judgment, Assignment of Errors, Petition for an Order Allowing Appeal, Order Allowing Appeal and Fixing Amount of Bond, Undertaking and Praeipie for Transcript on Appeal, in the case of Alfred J. Pritchard, Plaintiff, vs. George K. McLeod et al., Defendants, No. 2392-Civil, this Court, and of the whole thereof, as appears from the records and files in my office at Nome, Alaska; and further certify that the original Citation and Order Enlarging Time to File Record in the above-entitled cause are attached to this transcript.

Cost of Transcript \$9.05, paid by G. J. Lomen, Attorney for Plaintiff.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court this 24th day of October, A. D. 1912.

J. SUNDBACK,
Clerk. [27]

*In the District Court for the District of Alaska,
Second Division.*

ALFRED J. PRITCHARD,

Plaintiff,

vs.

GEORGE K. McLEOD, THE FAIRHAVEN
WATER COMPANY, a Corporation, JOHN
DOE and RICHARD ROE,

Defendants.

Citation.

United States of America,
District of Alaska,—ss.

The President of the United States of America, to
George K. McLeod, The Fairhaven Water Com-
pany, a Corporation, John Doe and Richard
Roe, Defendants, Greeting;

You and each of you are hereby cited and admon-
ished to be and appear at the United States Circuit
Court of Appeals for the Ninth Circuit, to be held
at the city of San Francisco, in the State of Cali-
fornia, within thirty days from the date of this Cita-
tion, on the 20 day of November, 1912, pursuant to
an order allowing appeal, entered in the office of the

clerk of the United States District Court for the District of Alaska, Second Division, from the final judgment and decree filed and entered therein on the 6th day of September, 1912, in that certain suit wherein you, the said George K. McLeod, The [28] Fairhaven Water Company, John Doe and Richard Roe, were defendants, and Alfred J. Pritchard was plaintiff, to show cause, if any there be, why the said final judgment and decree rendered against said plaintiff in said order allowing appeal mentioned should not be granted and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States of America, this 21st day of October, 1912.

CORNELIUS D. MURANE,

District Judge.

Attest my hand and seal of the United States District Court for the District of Alaska, Second Division, at the Clerk's office at Nome, Alaska, this 21st day of October, 1912.

[Seal]

J. SUNDBACK,

Clerk of the United States District Court for the District of Alaska, Second Division.

J. Allison Bruner,

Deputy.

Service of the above and foregoing Citation is hereby acknowledged by receipt of Copy, this 21st day of October, 1912.

IRA D. ORTON,

Attorney for Defendants. [29]

[Endorsed]: No. 2392. In the District Court for the District of Alaska, Second Division. Alfred J. Pritchard, Plaintiff, vs. George K. McLeod et al., Defendants. Citation. [30]

*In the District Court for the District of Alaska,
Second Division.*

ALFRED J. PRITCHARD,

Plaintiff,

vs.

GEORGE K. McLEOD, THE FAIRHAVEN
WATER COMPANY, a Corporation, JOHN
DOE and RICHARD ROE,

Defendants.

**Order Enlarging Time to [Dec. 21, 1912, to] File
Record, etc.**

On motion of G. J. Lomen, attorney for plaintiff above named, and good cause appearing to the Court therefor, it is hereby

ORDERED that the time for filing and docketing the transcript and record in the above-entitled cause in the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, is hereby extended to and until the 21st day of December, 1912.

Done in open court this the 21st day of October, 1912.

CORNELIUS D. MURANE,
District Judge.

Service of the foregoing order is hereby admitted this 21st day of October, 1912.

IRA D. ORTON,
Attorney for Defendants. [31]

[Endorsed]: No. 2392. In the District Court for the District of Alaska, Second Division. Alfred J. Pritchard, Plaintiff, vs. George K. McLeod et al., Defendants. Order Enlarging Term to File Record. Filed in the Office of the Clerk of the District Court of Alaska, Second Division at Nome. Oct. 21, 1912. John Sundback, Clerk. By J. A. B., Deputy. [32]

[Endorsed]: No. 2206. United States Circuit Court of Appeals for the Ninth Circuit. Alfred J. Pritchard, Appellant, vs. George K. McLeod, The Fairhaven Water Company, a Corporation, John Doe and Richard Roe, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the District of Alaska, Second Division.

Received November 8, 1912.

F. D. MONCKTON,
Clerk.

Filed December 12, 1912.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.



IN THE

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

ALFRED J. PRITCHARD,
Appellant,
vs.

GEORGE K. McLEOD, FAIRHAY-
VEN WATER COMPANY, a cor-
poration, JOHN DOE and RICH-
ARD ROE,
Appellees.

No. 2206.

Brief of Appellant

WILLIAM H. GORHAM,
Solicitor for Appellant.

653 Colman Building,
Seattle, Washington.

In the
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

ALFRED J. PRITCHARD,
Appellant,
vs.

GEORGE K. McLEOD, FAIRHAVEN WATER COMPANY, a corporation, JOHN DOE and RICHARD ROE,
Appellees.

No. 2206.

Brief of Appellant

STATEMENT OF THE CASE.

I.

The appellant, Alfred J. Pritchard, brought this suit below alleging in his complaint:

1. Ownership in himself of certain real and personal property (Paragraph III of Complaint, Record p. 2).

2. An agreement in writing between Pritchard and George K. McLeod, one of the appellees, for the

purchase by McLeod of all of said property (Paragraph IV of Complaint, Id. p. 2).

3. The execution and delivery by McLeod to Pritchard of two promissory notes in the agreement mentioned aggregating \$4,000, both maturing at a date prior to commencement of suit, and that Pritchard is holder of said notes (Paragraph V of Complaint, Id. p. 2).

4. The payment by McLeod to Pritchard of the sum of \$1,000 mentioned in the agreement. (Paragraph VI of Complaint, Id. p. 3).

5. The delivery of the personal property mentioned in the agreement, to McLeod; and the description of the real property and mining claims mentioned in the agreement. (Paragraph VII of Complaint, Id. p. 3.)

6. (a) The neglect and refusal of McLeod to pay said notes or to pay the 25% of the gross output of gold from any of the mining claims mentioned in the agreement until the sum of \$25,000 should be paid or at all;

(b) That it was understood and agreed that said \$25,000 mentioned in said agreement should be paid within a reasonable time;

(c) That more than a reasonable time has elapsed since the making of the agreement;

(d) That McLeod has neglected to mine said premises or to extract gold therefrom whereby, and on account of which, all of said moneys are now due and payable. (Paragraph VIII of Complaint, Id. pp. 3, 4.)

7. That Pritchard has always been ready and willing to perform the agreement mentioned on his part and is so willing, on being paid remainder of purchase money with interest from date of filing of this complaint, to convey said premises as provided in the agreement and to let McLeod into the possession of said premises and the rents and profits thereof from date of agreement. (Paragraph IX of Complaint, Id. p. 4.)

8. Tender of deed to premises by Pritchard to McLeod July 26, 1912; refusal of McLeod to accept same or pay balance of purchase price. (Paragraph X of Complaint.)

9. That The Fairhaven Water Company, a corporation, John Doe and Richard Roe, claim some right, title and interest in and to said premises, but such claims, if any, are junior and subordinate to rights and claims of Pritchard. (Paragraph XI of Complaint.)

The prayer of the complaint is for judgment:

(1) That McLeod performs said agreement and pay balance of purchase money with interest and costs;

(2) That if McLeod will not accept conveyances and pay purchase money, then the premises be sold and proceeds be applied to payment of same with costs;

(3) That McLeod be required to pay the deficiency, if any.

The agreement dated April 7, 1908, is in brief as follows:

Pritchard agrees to sell and McLeod agrees to buy certain placer mining claims and personal property, lots and water rights owned by Pritchard in the Fairhaven Mining District, District of Alaska, for \$30,000, upon the follows terms and conditions:

(1) \$1,000 cash, the receipt whereof is acknowledged;

(2) \$1,500 note due and payable November 6, 1908;

(3) \$2,500 note due and payable April 6, 1909;

(4) 25% of gross output of gold taken from any of the claims sold by Pritchard to McLeod, to be

paid upon demand to Pritchard until sum of \$25,000 is paid in full;

(5) That Pritchard upon his return to Seattle will execute quit-claim deeds subject to conditions of agreement in favor of McLeod to cover mining claims, lots and water rights and bill of sale of personal property;

(6) Proceeds of any of certain of personal property sold by agent of Pritchard previous to date of agreement to belong to Pritchard;

(7) Proceeds of any articles sold after date of agreement to belong to McLeod;

(8) * * *

(9) Pritchard will execute an order to his agent to turn over everything to McLeod;

(10) The intent and purpose of agreement is Pritchard sells to McLeod all his real and personal property then owned by Pritchard in Fairhaven Mining District and undertake to execute all necessary deeds and transfers when called upon to do so (excepting a certain named placer mining claim). (Record p. 68.)

II.

The appellees, George K. McLeod and Fairhaven Water Company, defendants below, were duly served

with summons, and thereafter separately entered a general appearance and separately demurred to the complaint, on the ground that the complaint did not state facts sufficient to constitute a cause of action. The lower court sustained the demurrer, the plaintiff below declined to amend his complaint and a judgment of dismissal with costs to defendant was thereupon rendered and entered by the court. From this judgment plaintiff below appeals.

SPECIFICATIONS OF ERRORS.

First: That the lower court erred in sustaining the demurrer of defendants.

Second: That the lower court erred in filing and entering its final decree and judgment dismissing said action in favor of defendants and against plaintiff, over the objection of plaintiff.

ARGUMENT.

THE CONTRACT. The contract pleaded discloses on its face that it is not an option; that is, "an offer to sell coupled with an agreement to hold open for acceptance for the time specified, such agreement being supported by a valuable consideration" (39 *Cyc.* 1232); and which offer must be accepted within a reasonable time where no time is specified (39 *Cyc.* 1241); or as the District Court of Alaska, Second Division, defines it in *Montgomery vs. Waldeck*, 2 Alaska Reports 585: " 'The obligation by which one binds himself to sell and leaves it discretionary with the other party to buy, is what is termed in law an 'option,' which is simply a contract by which the owner of the property agrees with another person that he shall have the right to buy the property at a fixed price within a certain time,' *Black vs. Maddox*, 104 Ga. 157, 30 S. E. 723, citing *Ide vs. Leiser*, 10 Mont. 5, 24 Pac. 695."

The written instrument must be construed so as to carry into effect the intention of the parties and in the case at bar that intention, as such, is definitely set forth in the contract under consideration, wherein it recites that "the party of the first part *agrees to sell* and the party of the second part

agrees to buy'' the property described in the agreement (Record p. 6); and further reciting that the 25% of the gross output taken from any of the claims or fractions of claims *sold* by the party of the first part to the aforesaid party of the second part to be paid over upon demand to said party of the first part until the sum of \$25,000 (balance of the purchase price) is paid in full (Paragraph numbered 4 of Agreement, Record p. 7); and further recites that "*the intention and purpose of the agreement is that the party of the first part sells to the party of the second part all his real and personal property*" * * * (Paragraph numbered 10 of Agreement, Record p. 7).

The consideration supporting the agreement is the mutual obligation of the parties, the absolute agreement on the one part to sell and on the other part to buy, for the sum of \$30,000.00, and payment of \$1,000.00 on account of that purchase price at the date of the agreement, the receipt whereof is recited and acknowledged in the instrument itself.

The covenants to be performed on the part of the vendor are that the vendor will, upon his return to Seattle, execute quit-claim deeds of mining claims, lots and water rights subject to the conditions of the agreement and bill of sale of personal property

(Paragraph numbered 5 of Agreement, Record p. 7) and will execute an order to his agent to turn over everything to vendee (Paragraph numbered 9 of Agreement, Record p. 7) and will execute all necessary deeds and transfers *when called upon to do so* (Paragraph numbered 10 of Agreement, Record p. 7); the covenants on the part of vendee are the execution and delivery of two promissory notes maturing on days certain aggregating \$4,000.00 (Paragraphs numbered 2 and 3 of Agreement, Record p. 6); an implied agreement on the part of vendee to operate the mining claims for the purpose of extracting gold therefrom and the payment to vendor of 25% of gross output of the gold taken from any of the claims until the sum of \$25,000.00 is paid in full. (Paragraph numbered 4 of Agreement, Record pp. 6 and 7).

The covenant by the vendor to make the necessary conveyances is not a condition precedent to performance by vendee for such conveyance under the express terms of the agreement are to be made by vendor "when called upon to do so." (Paragraph numbered 10 of Agreement, Record p. 8).

An agreement on the part of vendee to operate the mines for the purpose of extracting gold therefrom is necessarily implied from the agreement because it is only out of the funds derived from such

operation that the \$25,000.00, balance of the purchase price, is to be paid—if there is not an implied agreement upon the part of the vendee to operate the mining claims, then we have this situation: the vendee can call upon the vendor to make the necessary conveyances, and the vendor must make such conveyances, when so called upon, as the making of such conveyances is not subject to any condition precedent to be performed by the vendee; and the vendee would then acquire the property for the sum of \$5,000.00, to-wit: \$1,000.00 cash and \$4,000.00 in notes, when in fact the purchase price agreed to be accepted and paid is the sum of \$30,000.00.

Genet vs. Delaware & Hudson Canal Co., 136 N. Y. 593, 32 N. E. 1078.

The consideration moving the vendor was not only the payment of the \$1,000.00 cash and the execution and delivery of the notes but also 25% of the prospective output of the mining claims which vendee agreed to pay but which could not be realized in whole or in part, in any event, unless vendee would, in fact, work the mining claims.

Appellant does not contend that the vendee agreed by implication or otherwise under the terms of the agreement that the mining claims would produce the sum of \$100,000.00, 25% of which was to be

paid vendor or that he would operate the mining claims any longer than a prudent man would be justified in so doing considering the cost and output of such operation.

Appellant's contention is that the vendee under the agreement agreed that he would operate the mining claims and pay appellant 25% of the gross output at least so long as the output exceeded 25% of the cost of operation.

In *Montgomery vs. Waldeck, supra*, the agreement to sell and convey certain mining property in Alaska was signed by the vendor alone, which, the court says, "indicates an intention to absolutely bind the plaintiffs to sell and convey but to leave the defendant free to purchase or not." The court further says: "Turning to the agreement itself, we find in the second and third paragraphs the usual covenant on the side of the plaintiffs for a consideration to sell and convey certain lands to the defendant within a certain period, with a corresponding covenant on defendant's part, in consideration of the plaintiff's covenants, to purchase said lands within the same period. If this were all of the agreement, and defendant had signed the agreement, the liability of the defendant in this action would, I conceive under the evidence, be fixed."

In the case at bar the agreement is that vendor agrees to sell and vendee agrees to buy, and both have signed the agreement. Under the construction given such agreements in Alaska, the agreement pleaded is an absolute one to buy and sell and not an *option*.

In *Ray vs. Hodge*, 13 Pac. (Or.) 599, the plaintiffs had assigned half interest in a quick silver lease to Hodge, defendant's testator, for the following consideration: \$750.00 cash, \$1,250.00 to each of the plaintiffs when 250 flasks of quick silver produced, and upon a suit to recover the deferred payment, it was held that, in the absence of a showing that 250 flasks had been produced, the vendor could not recover from the vendee the amount stipulated without proving that the vendee had failed to make reasonable efforts to operate the mine in view of the outlay attending it and the prospects of its development.

In the case of *Toombs vs. Consolidated Poe Mining Company*, 15 Nev. 444, the owners of the mining company, then unincorporated, entered into a contract with Toombs whereby it was agreed that the latter should build a quartz mill at an estimated cost of ten thousand dollars for the purpose of working the ores of the company's mines; the mill, when, completed, to be the property of Toombs and the members of the mining company. Subsequently the mining

company was incorporated under the same name, with Toombs' consent. Toombs built the mill, and after the incorporation it was accepted by the proper officers of the mining company. Toombs was paid the estimated cost and by an instrument under seal called therein "a deed and account of settlement between the parties" it was agreed that the mill had cost five thousand dollars more than the original estimate and in satisfaction of said amount the following stipulation was inserted in and made a part of the conveyance from Toombs to the mining company, to-wit:

"Said first party (Poe company) hereby agrees and covenants that out of the first proceeds of crushing and reducing ores of gold and silver in said mill, from its said mine, after the payment of the expenses of working its said mill and mine, it will pay to the said second party (plaintiff), his heirs or assigns, the sum of two thousand five hundred seventy-five dollars in United States gold coin, with interest thereon until the payment of such interest and principal of note of — percentum per month from date of these presents; but such sum of two thousand five hundred seventy-five dollars shall not be a debt otherwise collectible of first part, until the proceeds of its mill and mine, over expenses, will pay such sum and interest, or part thereof, and then only to the extent of such part over such expenses. * * *"

The plaintiff Toombs sought to enforce a vendor's lien upon the mill and mill site for the deferred payment. There were no net proceeds derived from

working of the mine, and it was held by the court (syllabus) "that plaintiff had no right of action for the money mentioned in the agreement, or for the enforcement of a vendor's lien." The court in its decision, at page 488, says:

"We express no opinion as to what plaintiff's right or remedies would have been if the inability to pay from net proceeds had been caused by the fault of the company, because that is not alleged or claimed. *It was the duty of the company, under the covenants stated in the deed, to work the mine, and by proper means extract the gold and silver from the ores.*"

In the case of *Skidmore vs. Eikenberry*, 53 Iowa 621, the contract was in the following language:

"In case of finding good, merchantable coal, not less than four feet in thickness, in shaft now being sunk on land this day bought by Mayberry Skidmore, I promise to pay Mayberry Skidmore two hundred thirty-two dollars and eighteen cents, with ten per cent interest from December 1, 1876, on April 1, 1877; if not so found this obligation to be void." There were two other similar obligations, the three aggregating fifteen hundred and sixty-one dollars. A suit was brought for the recovery of sums mentioned in these obligations and the petition alleged that if the defendant did not strike coal four feet in thickness in said shaft it was owing to his negligence in not sinking the shaft to a sufficient depth. The trial court instructed the jury as follows, *inter alia*:

"Under the contract in question in this case, if you find said note was given as part consideration for the purchase of the eighty acres on which said shaft was located and that the defendant was engaged in

sinking a shaft on said land at the time under the lease in evidence, in this case, then, under this contract *the defendant would be bound to make a reasonable effort to find coal of the character described in the contract, and if he neglected so to do, then he would be liable under the contract for said money.*"

The Supreme Court of Iowa, in the case on appeal, as cited above, referring to the instructions to the jury, including the one set out above, say:

"We think they place a proper construction on the contract and announce correct rules of law. The defendant might have been under obligation to sink the shaft to the lowest practicable depth, if he had been certain of finding the requisite vein of coal at that depth. But there is no rule of law which requires him to hazard his money to such an extent upon an uncertainty. All that the law requires is that he shall act in good faith and exercise reasonable diligence and use reasonable exertions in view of all the surrounding circumstances to find the specified vein. The law cannot define absolutely the depth to which the defendant should go, nor the efforts which he should exert. These are questions of fact for the jury, to be determined under the general direction that the exertions must be reasonable in view of the circumstances."

In the case of *Oliphant vs. Woodburn Coal & Mining Company*, 63 Iowa 332, the plaintiff sought to recover of defendant upon a written promise to pay money when it "should succeed in sinking a shaft on its leased lands and developing a paying vein of coal," the contract being silent as to when the com-

pany should sink the shaft or as to what efforts it should make to do so, except that it provided that the company should "use all necessary efforts to sell stock to raise sufficient money to dig a shaft." The court say, at page 337:

"But the raising of money by sale of stock would not of itself have caused the plaintiff's claim to mature. The officers still had a discretion to be exercised, in view of the circumstances, as they should appear from day to day. It may be conceded that there was an implied obligation to act in good faith toward the plaintiff, or, what is nearly the same thing, not to abuse their discretion. But they did not, we think, undertake to contract away their discretion. They had been elected for the express purpose of exercising it. Their experience, knowledge, judgment and skill had been contracted for by the company, and we will not presume from anything we find in the contract that they intended to subordinate their judgment to what they might suppose would be that of a jury. If, then, they did not contract away their discretion, it became, at most, as the court held, a question of the want of good faith or abuse of discretion. It is true the court went a little further and held that the plaintiff, in order to recover, should also show that his claim would have become payable, if a fair and reasonable discretion had been exercised in the work. *Possibly, if the plaintiff had shown a want of good faith or abuse of discretion, his claim should be deemed to have become payable without any further showing, but it is immaterial to determine this. We hold that the plaintiff could not recover without showing want of good faith or abuse of discretion, and we cannot find the slightest evidence of either. The company did not sell out, so as to put it out of its power to discover coal, nor did it refuse to proceed*

after having discovered it. It retained its lease and pursued its work of prospecting, preparatory to determining where and when to sink a shaft. It might perhaps have prospected more thoroughly by sinking a shaft instead of drilling. But it could not do this without the means, and the evidence not only fails entirely to show that it had the means, but tends to show affirmatively otherwise."

There is no opinion of the lower court in the record and the writer of this brief is ignorant of the grounds of the lower court's ruling.

The only theory, appearing to appellant, under which it could be held that the complaint fails to state a cause of action is that the agreement pleaded was not an executory contract of sale, but a mere *option* to mine the premises, discretionary with vendee whether he would elect to undertake the same, the balance of the purchase price only to mature in the event of his electing to mine the premises, and in the further event of there being any gross output, 25 per cent of the proceeds of which would then be payable to the vendor.

But such theory would overlook the *entirety* of the agreement on the part of the vendor to sell, and the vendee to buy, the mining claims and other property and the acceptance of the option (if such it were) by vendee by the delivery to vendee of the personal

property alleged in the complaint and admitted by demurrer.

If the agreement were an option originally, then by the acceptance by vendee it became a contract of sale. The option, when accepted, changes the option into a contract of sale binding upon both parties. An option to purchase is a continuing offer by the vendor to sell, and its acceptance by the purchaser completes the contract, exhausts the option and estops the purchaser from subsequently repudiating it or choosing another alternative.

39 *Cyc.* 1243.

Castlecreek Water Co. vs. City of Aspin, 146 Fed. 8, C. C. A., 8th Circuit.

Acceptance of the option may be implied from acts and conduct of the parties, as by taking possession, making improvements, etc.

39 *Cyc.* 1241.

Therefore, if the agreement was not a contract of sale originally, as appellant contends it was, it became such a contract of sale upon the delivery of the personal property to the defendant.

TIME OF PERFORMANCE. Appellant's further contention is that the vendee agreed by implication that such operation of the mining claims should be con-

ducted within a reasonable time. No time is fixed by the agreement in terms for performance by the vendee. The rule is that where no time for performance is fixed, the implication is that a reasonable time is intended.

2 Page on Contracts, Sec. 1154.

9 Cyc. 611.

Gill Mfg. Co. vs. Hurd, 18 Fed. 673.

Hood vs. Hampton Plains Ex. Co., 106 Fed. 408.

Minn. Gas Light Co. vs. Kerr, 122 U. S. 300, 30 L. Ed. 1190.

NON-PERFORMANCE. The agreement is dated April 7, 1908, and more than four years had elapsed between the date of the agreement and the commencement of this suit, which, the complaint alleges, is more than reasonable time within which to work the mining claims and the complaint further alleges the neglect of the vendee to mine the premises or to extract gold therefrom, allegations admitted by the demurrer.

III.

THE REMEDY.

Under such a contract, partly executed in the delivery of the personal property and partly executory

for the conveyance of the mining claims and the payment of the balance of the purchase price, there are mutual obligations and rights which cannot be extinguished except by mutual consent.

And, without the consent of the vendor, the vendee will not be permitted to affirm so much of the agreement (which is entire and not severable) as applies to the personal property and as is particularly advantageous to him and to disaffirm and repudiate so much as is, or may turn out to be, burdensome.

Under a contract of sale for real property, for default of vendee, the vendor has a remedy in equity for specific performance and, in the alternative, to foreclose vendee's right of purchase.

39 *Cyc.* 1900, 1994.

Keller vs. Lewis, 53 Cal. 114.

We submit the trial court erred in sustaining the demurrer to the complaint and, upon appellant's declining to amend his complaint, in entering final decree and judgment against appellant.

Respectfully submitted,

WILLIAM H. GORHAM,

Solocator for Appellant.

IN THE
United States
Circuit Court of Appeals
 FOR THE NINTH CIRCUIT

ALFRED J. PRITCHARD,
Appellant,

vs.

GEORGE K. McLEOD, FAIRHAVEN WATER COMPANY, a corporation, JOHN DOE and RICHARD ROE,
Appellees.

No. 2206.

Brief of Appellees

IRA D. ORTON,

Attorney for Appellees.

Nome, Alaska

In the
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

ALFRED J. PRITCHARD,

Appellant,

vs.

GEORGE K. McLEOD, FAIRHAVEN WATER COMPANY, a corporation, JOHN DOE and RICHARD ROE,

Appellees.

No. 2206.

Brief of Appellees

The only question raised by this appeal is, Does the complaint in this suit state a cause of action for the specific performance of the contract sued on? The court below held that it did not. A sufficient statement of the case is to refer to the transcript for a copy of the complaint (Tr. pp. 1-8).

The counsel for appellant contends that the contract sued on is an absolute bilateral contract of sale and cannot in any sense be termed an option. The appellees have no quarrel with the definition of an option given by the authorities cited by appellant

on page 9 of his brief, but respectfully submit that the definition is worded to embrace the cases under consideration and is not exhaustive enough to embrace all optional contracts. The definition there given is that an option "is simply a contract by which the owner of property agrees with another person that he shall have the right to buy the property at a fixed price within a certain time" (Appellant's Brief p. 9). But an option may also be a right to purchase certain property at an indefinite time, but under certain conditions, as in the case at bar. In the contract in suit the appellee agrees to buy certain property for \$30,000 "*upon the following terms and conditions,*" one of which is a part of the purchase price, \$25,000, is to be paid as follows (quoting from the contract):

"4. Twenty-five per cent. of the gross output of gold taken from any of the claims sold by the party of the first part to the aforesaid party of the second part, to be paid over upon demand to said party of the first part, until the sum of twenty-five thousand dollars (\$25,000) is paid in full."

Such a contract has been held to be only an option.

Smith vs. Jones, 60 Pac. 1104 (Utah).

The real question, however, is not whether the contract in suit may or may not be what is technically called an option, but whether it created any

obligation on the appellee to pay the \$25,000 from any other source than from 25 per cent. of the gross output of the claims. This question should be answered in the negative.

9 *Cyc.* 616, and cases there cited.

Barron vs. Trust Co., 68 N. E. 831 (Mass.).

Rogers Ruger Co. vs. McCord, 91 N. W. 685 (Wis.).

Lorillard vs. Silver, 36 N. Y. 578.

Gardner vs. Edwards, 26 S. E. 155 (N. C.).

Bagley vs. Cohen, 50 Pac. 4 (Cal.).

Orman vs. Ryan, 55 Pac. 168 (Colo.).

Great Western Oil Co. vs. Carpenter, 95 S. W. 57.

The case of *Ray vs. Hodge*, 13 Pac. 599 (Or.), cited by appellant on page 14 of his brief, is also directly in point.

There is no clause in the agreement binding appellee to mine the property. Appellant claims such a covenant must be implied, and cites to support this contention *Ray vs. Hodge*, 13 Pac. 599 (Or.); *Toombs vs. Mining Co.*, 15 Nev. 444, and *Oliphant vs. Woodburn Coal & Min. Co.*, 63 Ia. 332. These cases are easily distinguished from the case at bar. In *Ray vs. Hodge, supra*, the case is thus stated in the syllabus:

“A agreed to and did assign to B a half interest in a lease of a gold and quicksilver mine for ‘\$750

cash, and \$1,200 when 250 flasks of quicksilver should be produced.' *Held*, that in the absence of a showing that 250 flasks of quicksilver had been produced A could not recover from B the amount stipulated without proving that B had failed to make reasonable efforts to operate the mine in view of the outlay attending it and the prospects of its development."

It will be found upon examining the opinion that the lease in *Ray vs. Hodge* required the lessee in express terms to work the mine, and such agreement was not left to be implied.

In delivering the opinion the court in *Ray vs. Hodge* say (13 Pac. 601):

"But the court is unable to agree with the respondent's counsel that Hodge obligated himself by taking the assignment of the half interest in the lease to extract from the mine 250 flasks of quicksilver. He did not agree to prosecute the work any longer than it could successfully be operated. The tacit understanding that the mine would prove a success was a part of the implied understanding that he would work it. The undertaking was evidently an experiment. Hodge was willing to pay the respondents \$1,500 cash and \$2,500 more when the 250 flasks of quicksilver were produced; but he did not agree expressly or by implication that he would produce that quantity of quicksilver or prosecute the enterprise any longer than a prudent man would be justified in continuing it."

In the case at bar no allegation is made in the complaint that the claims could be worked at a profit, or that they or any of them contained any gold whatever, but the allegation simply is that

appellee "neglected to mine said premises or to extract gold therefrom, whereby and on account of which all of said moneys are now due and payable."

For appellant to prevail under the case of *Ray vs. Hodge*, viewed under the most favorable aspect for appellant, it would be necessary for the contract in the case at bar to have contained an express agreement to work the claims, and it would further be necessary for appellant to have alleged in his complaint that by such work appellee could have extracted at a profit therefrom \$100,000 gross in gold. And even if we concede that an agreement to work if profitable could be impliedly read into the contract, an allegation in plaintiff's complaint that the claims or some of them could have been profitably worked and would have produced \$100,000 gross would still be necessary.

The Nevada and Iowa cases above referred to cited by appellant are distinguishable upon similar grounds as *Ray vs. Hodge*.

In the court below the plaintiff's counsel relied on the case of *Noland vs. Bull*, 33 Pac. 983, 24 Ore. 479, and it is from this case that it was argued that the \$25,000 became due absolutely in a "reasonable time" whether any gold was taken from the claims or not. But when properly considered, the case of *Noland vs. Bull* and all the authorities cited therein are favorable to appellee.

The court in *Noland vs. Bull* distinguished between a contract creating a conditional liability, such as in the case at bar, and a contract entered into a pay a present, conceded and admitted debt already due at "an uncertain future date when a certain specified transaction shall be accomplished." In the latter case the debt becomes due in a reasonable time, but in the former the liability itself is conditional.

This was the view taken by the judge of the court below in the case at bar. The reason why no opinion appears in the record, as referred to in the brief of counsel for appellant, is because it was only an informal oral opinion.

Contracts such as the one forming the basis of the suit at bar are very common in Alaska and other mining localities, and are usually spoken of in common parlance as contracts of sale payable on "bed-rock." That they create any personal liability to pay except upon production of the gold from the ground is a novel and startling doctrine which it is not believed the court will sanction.

It is respectfully submitted that the judgment should be affirmed.

ag

IRA D. ORTON,
Attorney for Appellees.

